

CLERK'S COPY

## TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1938

No. 676

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HORTON C. RORICK, PETITIONER,

vs.

DEVON SYNDICATE, LIMITED

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SIXTH CIRCUIT

---

PETITION FOR CERTIORARI FILED FEBRUARY 13, 1939.

CERTIORARI GRANTED MARCH 27, 1939.





# SUPREME COURT OF THE UNITED STATES

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HORTON C. RORICK, PETITIONER,

vs.

DEVON SYNDICATE, LIMITED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SIXTH CIRCUIT

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**IN THE  
United States Circuit Court of Appeals  
FOR THE SIXTH CIRCUIT**

\_\_\_\_\_  
No.....  
\_\_\_\_\_

HORTON C. RORICK,

*Appellant,*

*vs.*

DEVON SYNDICATE, LTD., AND PARIS E. SINGER,

*Appellees.*

\_\_\_\_\_  
**Appeal from the United States District Court for the  
Northern District of Ohio, Western Division**

\_\_\_\_\_  
**TRANSCRIPT OF RECORD  
TRIAL PLEADINGS AND TESTIMONY**

\_\_\_\_\_  
FRASER, EFFLER, SHUMAKER & WINN,  
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*Attorneys for Horton C. Rorick, Appellant.*

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*Attorneys for Devon Syndicate, Ltd.,  
and Paris E. Singer, Appellees.*



**IN THE  
DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF OHIO,  
WESTERN DIVISION.**

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**CAPTION**

United States of America;  
Northern District of Ohio, Western Division, ss.

Record of the proceedings of the District Court of the United States within and for the Western Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held at the City of Toledo, in said district, on the last Tuesday in April, being the 28th day of said month in the year of our Lord One Thousand Nine Hundred and Thirty-six, and of the Independence of the United States of America the One Hundred and Sixty-first, to-wit: on Saturday, the 11th day of July, A. D. 1936.

Present: Honorable George P. Hahn, United States District Judge.

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No. 3711 At Law

Horton C. Rorick

vs.

Devon Syndicate, Ltd., and Paris E. Singer.

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Said action was commenced on the 30th day of December, A. D. 1930, and proceeded to final disposition at the term and day above written, and during the progress thereof, pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

*Certified Copy of Record***CERTIFIED COPY OF RECORD**

(Filed Dec. 30, 1930)

Pleas before the Court of Common Pleas within and for the County of Lucas and State of Ohio, at a term thereof begun and held at the Court House in the City of Toledo, on Monday, the 22nd day of September, in the year of our Lord One Thousand Nine Hundred and Thirty.

Present: Honorable James S. Martin, Honorable James Austin, Jr., Honorable Charles M. Milroy, Honorable Roy R. Stuart, Honorable Charles H. Lemmon, Honorable Robert G. Gosline, Presiding Judges.

Be it remembered, that heretofore, to-wit: On the 19th day of June, A. D. 1930, plaintiff, by his attorneys, filed in said court a petition in the above entitled cause, which petition is in the words and figures as follows. to-wit:

**IN THE COMMON PLEAS COURT OF LUCAS  
COUNTY, OHIO**

No. 121340

Horton C. Rorick,

Plaintiff,

vs.

Devon Syndicate, Ltd., and Paris E. Singer,  
Defendants.

**PETITION**

For his cause of action herein, plaintiff says that the defendant, Devon Syndicate, Ltd., is a corporation organized and existing under the laws of the Province of Quebec in the Dominion of Canada, having its principal office in the Transportation Building in the City of Montreal, Province of Quebec, Dominion of Canada; that the defendant, Paris E. Singer, is a non-resident of the State of Ohio; that prior to January 1, 1926, he caused to be incorporated said defendant, Devon Syndicate, Ltd., and transferred to said corporation, a large portion of his assets; that he owns or controls all of the capital stock of the corporation, Devon Syndicate, Ltd., and is president and managing officer thereof.

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Plaintiff says that the said Paris E. Singer, either through his ownership or control of all of the stock of Devon Syndicate, Ltd., is and has been, and was at the times hereinafter referred to, in actual control of various corporations, among them, the Palm Beach Ocean Realty Company; the Ocean and Lake Realty Company; Everglades Club Hotel and Apartment Company; and The Highland Glades Farms Company; and the said Paris E. Singer is, and was at the times hereinafter complained of, very heavily interested in all of said corporations.

On or about April 8, 1926, the defendant, Paris E. Singer, made a written contract with the plaintiff wherein and whereby this plaintiff continued to be employed by said Singer for the calendar years 1926 and '27, as financial adviser for the said Singer, and for all of the corporations controlled by the said Singer, including Devon Syndicate, Ltd., Palm Beach Realty Company, The Ocean and Lake Realty Company, Everglades Club Hotel and Apartment Company, and The Highland Glades Farms Company, and under and by virtue of the terms of said agreement, which was accepted by the plaintiff, it was provided that the services to be rendered by the plaintiff would largely be of an advisory nature, and they were not in any way conflict with plaintiff's duty as a partner in Spitzer Rorick and Company; and it was also agreed that the amount of compensation to be paid plaintiff should be fixed exclusively by the plaintiff, and the defendant, Singer, agreed to pay whatever amount was fixed by plaintiff with the limitation that the charge should not exceed Fifty Thousand Dollars per year and expenses for the calendar years 1926 and 1927.

Plaintiff says he accepted said contract and entered upon the performance of said duties, and it was then discovered by both parties that the services rendered and to be rendered were of vastly greater extent and value than was contemplated by either party at the time of the making of the contract of April 8, 1926; that plaintiff and defendant, Singer, thereupon and shortly thereafter agreed that plaintiff should assume and perform the additional duties requested by the defendant, Singer, and the contract made on April 8, 1926, was modified to the extent that the limitation of Fifty Thousand Dollars per year was expressly removed, and it was agreed that no limitation would be placed upon the value of the services to be rendered, and that plaintiff should and would have the right to fix the value of the services, and the amount of compensation to be paid, and defendant, Singer,



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agreed that said compensation as fixed by plaintiff would be paid to plaintiff.

Plaintiff says that the defendant, Devon Syndicate, Ltd., in the month of August, 1926, agreed with the plaintiff that it would join with the defendant, Singer, in the employment and compensation to be paid to plaintiff for the services rendered, and to be rendered as aforesaid, and on or about March 12, 1927, the defendant, Devon Syndicate, Ltd., ratified and approved said contract in writing, and upon said day, in writing, in consideration of services already rendered and to be rendered by the plaintiff to said defendants and to affiliated corporations hereinbefore named, and other corporations owned and controlled by Devon Syndicate, Ltd., agreed that it would pay to the plaintiff for services whatever amount the plaintiff should fix as the value thereof, and in such amounts and on such dates as in the sole discretion of the plaintiff would be fixed. It was the intent of the plaintiff and the defendants that the services rendered and to be rendered by the plaintiff referred to in both of said written contracts would be the same services and would be rendered to the said defendants, and all of the interests or corporations owned or controlled by the defendants.

Plaintiff says that following the expiration of the year 1927, he continued performing the same services for the defendants as aforesaid, by and with their full consent and approval down to the 12th day of June, 1930, at which time he resigned; that during all of said time, down to the 12th day of June, 1930, plaintiff fully performed his contracts, and rendered services as financial adviser and otherwise in connection with the properties aforesaid to the full satisfaction and approval of the defendants; that during the period of employment and down to the time of his resignation, plaintiff devoted a very large amount of time to the work involved, and handled assets of the defendants estimated by them to be of more than Twenty Million Dollars in value, and by reason of his efforts, the properties of the defendants and the other corporations which were intricately involved, were largely saved for the defendants, and the other interested corporations, and his services, during all of said time, were accepted by the defendants and by them in every way, ratified, confirmed and approved.

Plaintiff says that acting under the provisions of his contracts aforesaid, he has fixed the value of his services rendered under his employment in the amount of Four



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expenses and credits received by plaintiff in connection with the performance of his duties under said contracts, and there is due him by virtue of said contracts of employment, the sum of Four Hundred Thousand (\$400,000.00) Dollars, together with interest at six per cent (6%) per annum from the 12th day of June, 1930. Said services did not include any services rendered as a partner of Spitzer Rorick and Company or as an officer of The Spitzer Rorick Trust and Savings Bank.

Wherefore, plaintiff prays judgment against said defendants for the sum of Four Hundred Thousand (\$400,000.00) Dollars with interest thereon at the rate of six per cent (6%) per annum from the 12th day of June, 1930.

William Roberts,  
Fraser, Hiatt, Wall & Effler,  
Attorneys for Plaintiff.

State of Ohio, County of Lucas, ss.

Horton C. Rorick, being first duly sworn, says that he is the plaintiff in the above entitled action; that he has read the foregoing petition and the allegations contained therein are true as he believes.

Horton C. Rorick.

Sworn to before me and subscribed in my presence,  
this 19th day of June, 1930.

(Seal) L. A. Wilhelm,  
Notary Public, Lucas County, Ohio.

My commission expires May 1, 1931.

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On the 19th day of June, 1930, there was filed in said court an affidavit in attachment and garnishment in the above entitled cause, which affidavit is in the words and figures as follows, to-wit:

COURT OF COMMON PLEAS  
AFFIDAVIT IN ATTACHMENT AND  
GARNISHMENT

State of Ohio, County of Lucas, ss.

Horton C. Rorick, being first duly sworn, says that he is the plaintiff in the above captioned suit; that he has commenced a civil action in the Court of Common Pleas of Lucas County, Ohio, against Devon Syndicate, Ltd., a corporation, and Paris E. Singer, on a debt arising upon contract, the same being an action to recover from defendants certain moneys due and owing to plaintiff on, under and by virtue of certain contracts between plaintiff and defendants, and the breach and refusal to perform thereof by defendants; that said claim is just and that plaintiff should recover thereon the sum of Four Hundred Thousand Dollars (\$400,000.00) with interest at the rate of six per cent (6%) per annum from June 12, 1930.

Affiant further says that he has good reason to believe that The Spitzer Rorick Trust & Savings Bank, a banking corporation of Toledo, The Spitzer Rorick Trust & Savings Bank and Horton C. Rorick as Trustees, The Everglades Club Company and The Blue Heron Land Company have moneys, property and assets of defendants, Devon Syndicate, Ltd., and Paris E. Singer, in their possession and control, due and payable, or to become due and payable to said defendants and that the said The Spitzer Rorick Trust & Savings Bank, a banking corporation of Toledo, The Spitzer Rorick Trust & Savings Bank and Horton C. Rorick as Trustees, The Everglades Club Company and The Blue Heron Land Company should receive notice of garnishment herein.

Affiant further says that the defendant, Devon Syndicate, Ltd., a corporation, is a foreign corporation organized under the laws of the Province of Quebec in the Dominion of Canada; that it is not for any reason, statutory or otherwise, exempted from attachment; that it has not filed with the Secretary of State of the State of Ohio a statement required by General Code, Section 183, nor procured from said Secretary of State the certificate provided for by General Code, Section 178; that it is not

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within the exceptions contained in Division 1 of the General Code, Section 11819, nor was it at the time of the occurrences referred to in the petition in this case, nor is it now qualified by law to do business in the State of Ohio; that the defendant, Paris E. Singer, is not a resident of this state and cannot be served with summons in this state; and that the facts set forth in this affidavit are true.

Horton C. Rorick.

Sworn to before me and subscribed in my presence this 19th day of June, 1930.

(Seal) D. W. Drennan,  
Notary Public, Lucas County, Ohio.  
My commission expires Aug. 9, 1930.

Endorsed on said petition and filed therewith was a praecipe for summons, order of attachment and notice to garnishee in said cause, which praecipe is in the words and figures as follows, to-wit:

**PRAECIPE**

To the Clerk:

Please issue summons in the above entitled action for the defendants, addressed to the sheriff of Lucas County, Ohio, returnable according to law, endorsed: "Amount claimed, Four Hundred Thousand (\$400,000.00) Dollars with interest at 6% per annum from June 12th, 1930."

Also issue order of garnishment and attachment addressed to the sheriff of Lucas County, Ohio, to be served upon The Spitzer Rorick Trust and Savings Bank, Nicholas Building, Toledo, Ohio; Horton C. Rorick and The Spitzer Rorick Trust and Savings Bank, Trustees, Nicholas Building, Toledo, Ohio; The Everglades Club Company, Nicholas Building, Toledo, Ohio; and The Blue Heron Land Company, Nicholas Building, Toledo, Ohio, commanding each of said persons and corporations to answer concerning monies, properties and other assets in their hands or under their control belonging to the defendants, Devon Syndicate, Ltd., and/or Paris E. Singer.

Fraser, Hiett, Wall & Effler,  
William Roberts,

Attorneys for Plaintiff.

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Thereupon a summons in said cause was issued by the clerk of said court, which summons is in the words and figures as follows, to-wit:

The State of Ohio, Lucas County, ss.

To the Sheriff of Lucas County:

You are commanded to notify Devon Syndicate, Ltd., and Paris E. Singer, that they have been sued by Horton C. Rorick in the Court of Common Pleas of Lucas County, and that unless they answer by the 19th day of July, 1930, the petition of said plaintiff against them filed in the clerk's office of the said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 30th day of June, A. D. 1930.

Witness, Geo. E. Hardy, clerk of our said court, and the seal thereof hereto affixed, at Toledo, this 19th day of June, A. D. 1930.

Geo. E. Hardy, Clerk,

(Seal)

By M. E. Theuerkauff, Deputy.

Said summons was endorsed as follows, to-wit: Summons in action for amount claimed, Four Hundred Thousand (\$400,000.00) Dollars with interest at 6% per annum from June 12th, 1930.

William Roberts,

Fraser, Hiett, Wall & Effler,

Attorneys for Plaintiff.

On the 30th day of June, 1930, said summons was filed with the sheriff's return thereon written as follows, to-wit:

The State of Ohio, Lucas County, ss.

Received this writ June 19th, 1930, the within named defendants Devon Syndicate, Ltd., and Paris E. Singer could not be found by me in Lucas County, Ohio.

Joseph Zimmerman, Sheriff,

G. Levy, Deputy.

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Thereupon an order of attachment in said cause was issued by the clerk of said court, which order of attachment is in the words and figures as follows, to-wit:

The State of Ohio, Lucas County.

To the Sheriff of Lucas County, Greeting:

You are hereby commanded to attach and safely keep the Lands, Tenements, Goods, Chattels, Stocks, or interest in Stocks, Rights, Credits, Moneys and Effects, in your county, of Devon Syndicate, Ltd., and Paris E. Singer not exempt by law from being applied to the payment of the claim of the plaintiff Horton C. Rorick or so much thereof as will satisfy plaintiff's claim for Four Hundred Thousand Dollars (\$400,000.00) with interest at the rate of six per cent (6%) per annum from June 12, 1930; and also for Fifty Dollars, the probable costs of this action.

And that you make due return of this order on the 30th day of June, A. D. 1930.

Witness, Geo. E. Hardy, clerk of the Court of Common Pleas of said County of Lucas, this 19th day of June, A. D. 1930.

Geo. E. Hardy, Clerk,

(Seal)

By M. E. Theuerkauff, Deputy Clerk.

On the 23rd day of June, 1930, said order of attachment was filed with the sheriff's return thereon written as follows, to-wit:

OFFICE SHERIFF LUCAS COUNTY, OHIO

Sheriff's Fees

Service ..... .75  
 Mileage ..... .16

            
 .91

Received this writ June 19, 1930, and there being no goods or chattels, lands or tenements found by me in Lucas County, Ohio, belonging to the within named Devon Syndicate, Ltd., et al., on which to levy, this writ is hereby returned, no money made, not satisfied.

Joseph Zimmerman, Sheriff,

By C. H. Kohne, Deputy.

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Thereupon a notice to garnishee in said cause was issued by the clerk of said court, which notice to garnishee is in the words and figures as follows, to-wit:

**NOTICE TO GARNISHEE**

State of Ohio, Lucas County, ss.

To the Sheriff of Said County, Greeting:

We command you to notify The Spitzer Rorick Trust and Savings Bank, Horton C. Rorick, The Spitzer Rorick Trust and Savings Bank, Trustees, The Everglades Club Company and The Blue Heron Land Company, to appear before the Honorable Court of Common Pleas of said county at the Court House in Toledo, on or before the 19th day of July, A. D. 1930, and answer, under oath, all questions put to them touching the property of every description, and credits, of the defendants Devon Syndicate, Ltd., and Paris E. Singer in their possession, or under their control, and they shall disclose truly the amount owing by them to said defendants, whether due or not.

The sheriff will make due return of this writ on the 30th day of June, A. D. 1930.

Witness my hand and the seal of said court, this 19th day of June, A. D. 1930.

Geo. E. Hardy,  
Clerk of the Court of Common Pleas of  
Lucas County, O.,

By M. E. Theuerkauff, Deputy.

(Seal)



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On the 30th day of June, 1930, said notice to garnishee was filed with the sheriff's return thereon written as follows, to-wit:

**SHERIFF'S RETURN**

The State of Ohio, Lucas County, ss.

Received this writ June 20th, 1930, at 4:30 o'clock P.M., and pursuant to its command I notified on the 21st day of June, 1930, at 10:00 o'clock A.M., the within named defendant The Spitzer Rorick Trust and Savings Bank, by delivering to Carl A. Mathias, secretary of the said The Spitzer Rorick Trust and Savings Bank, a true and certified copy of this writ with all endorsements thereon. The president or other chief officer of said company could not be found by me in Lucas County, Ohio. On the 21st day of June, 1930, I also notified the within named defendant Horton C. Rorick, Trustee, by delivering to him a true and certified copy of this writ with all endorsements thereon. On the 23d day of June, 1930, I also notified The Spitzer Rorick Trust and Savings Bank, Trustee, by delivering to Carl A. Mathias, secretary of the said The Spitzer Rorick Trust and Savings Bank, Trustee, a true and certified copy of this writ with all endorsements thereon. The president or other chief officer of said company could not be found by me in Lucas County, Ohio. On the 23rd day of June, 1930, I also notified the within named defendant The Everglades Land Company, by delivering to A. V. Foster, vice-president, he being in charge at time of service, of the said The Everglades Land Company, a true and certified copy of this writ with all endorsements thereon. The president or other chief officer of said company could not be found by me in Lucas County, Ohio. On the 21st day of June, 1930, I also notified the within named defendant The Blue Heron Land Company, by delivering to Horton C. Rorick, president of the said The Blue Heron Land Company, a true and certified copy of this writ with all endorsements thereon.

Joseph Zimmerman, Sheriff,  
By G. Levy, Deputy.

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On the 27th day of June, 1930, there was filed in said court an affidavit in attachment and garnishment in the above entitled cause, which affidavit is in the words and figures as follows, to-wit:

**COURT OF COMMON PLEAS****AFFIDAVIT IN ATTACHMENT AND  
GARNISHMENT**

State of Ohio, County of Lucas, ss.

Horton C. Rorick, being first duly sworn, says that he is the plaintiff in the above captioned suit; that he has commenced a civil action in the Court of Common Pleas of Lucas County, Ohio, against Devon Syndicate, Ltd., a corporation, and Paris E. Singer, on a debt arising upon contract, the same being an action to recover from defendants certain moneys due and owing to plaintiff on, under and by virtue of certain contracts between plaintiff and defendants, and the breach and refusal to perform thereof by defendants; that said claim is just and that plaintiff should recover thereon the sum of Four Hundred Thousand Dollars (\$400,000.00) with interest at the rate of six per cent (6%) per annum from June 12, 1930.

Affiant further says that he has good reason to believe that A. V. Foster, H. C. Rorick and Paris E. Singer as Trustees under a certain Voting Trust Agreement bearing date on or about February 1st, 1928, between them and Devon Syndicate, Ltd., have moneys, property and assets of defendants, Devon Syndicate, Ltd., and Paris E. Singer, in their possession and control, due and payable, or to become due and payable to said defendants and that the said A. V. Foster, H. C. Rorick and Paris E. Singer as Trustees should receive notice of garnishment herein.

Affiant further says that the defendant, Devon Syndicate, Ltd., a corporation, is a foreign corporation organized under the laws of the Province of Quebec in the Dominion of Canada; that it is not for any reason, statutory or otherwise, exempted from attachment; that it has not filed with the Secretary of State of the State of Ohio a statement required by General Code, Section 183, not procured from said Secretary of State the certificate provided for by General Code, Section 178; that it is not within the exceptions contained in Division 1 of the General Code, Section 11819, nor was it at the time of the occurrences referred to in the petition in this case, nor



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is it now qualified by law to do business in the State of Ohio; that the defendant, Paris E. Singer, is not a resident of this state and cannot be served with summons in this state; and that the facts set forth in this affidavit are true.

Horton C. Rorick.

Sworn to before me and subscribed in my presence this 25th day of June, 1930.

(Seal) D. W. Drennan,  
Notary Public, Lucas County, Ohio.  
My commission expires Aug. 9, 1930.

Endorsed on said affidavit in attachment and garnishment, and filed therewith was a praecipe for notice to garnishee in said cause, which praecipe is in the words and figures as follows, to-wit:

### PRAECIPE

To the Clerk:

Please issue notice to garnishee to A. V. Foster, H. C. Rorick and Paris E. Singer, as trustees under a certain voting trust agreement bearing date on or about February 1st, 1928.

Fraser, Hiatt, Wall & Effler,  
Attorneys for Plaintiff.

Thereupon a notice to garnishee in said cause was issued by the clerk of said court, which notice to garnishee is in the words and figures as follows, to-wit:

### NOTICE TO GARNISHEE

State of Ohio, Lucas County, ss.

To the Sheriff of said County, Greeting:

We command you to notify A. V. Foster, H. C. Rorick and Paris E. Singer, as trustees under a certain voting trust agreement bearing date on or about February 1st, 1928; to appear before the Honorable Court of Common Pleas of said county at the Court House in Toledo, on or before the 26th day of July, A. D. 1930, and answer, under oath, all questions put to them touching the property of every description, and credits, of the defendants Devon Syndicate, Ltd., and Paris E. Singer in their possession, or under their control, and they shall disclose truly the amount owing by them to said defendants, whether due or not.

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The sheriff will make due return of this writ on the 7th day of July, A. D. 1930.

Witness my hand and the seal of said court, this 27th day of June, A. D. 1930.

(Seal) George E. Hardy,  
Clerk of the Court of Common Pleas of  
Lucas County, Ohio,

By M. E. Theuerkauff, Deputy.

On the 3rd day of July, 1930, said Notice to Garnishee was filed with the Sheriff's Return thereon written as follows, to-wit:

**SHERIFF'S RETURN**

State of Ohio, Lucas County, ss.

Received this writ June 27th, 1930, 9:05 o'clock A. M., and pursuant to its command I notified on the 1st day of July, 1930, at 10:00 o'clock A. M., the within named defendants A. V. Foster and H. C. Rorick, as Trustees under a Certain Voting Trust Agreement bearing date on or about February 1st, 1928, by delivering to each of them a true and certified copy of this writ with all endorsements thereon. The within named defendant Paris E. Singer, as Trustee under a Certain Voting Trust Agreement bearing date on or about February 1st, 1928, could not be found by me in Lucas County, Ohio.

Joseph Zimmerman, Sheriff,  
By G. Levy, Deputy.

*Certified Copy of Record*

On the 10th day of October, 1930, there was filed in said Court an Affidavit for Constructive Service in the above entitled cause, which affidavit is in the words and figures as follows, to-wit:-

**IN THE COURT OF COMMON PLEAS****AFFIDAVIT FOR CONSTRUCTIVE SERVICE**

State of Ohio, County of Lucas, ss.

Horton C. Rorick, being first duly sworn, says that he is the plaintiff in the above entitled action, that defendant Devon Syndicate, Ltd., is a foreign corporation organized and existing under and by virtue of the laws of the Province of Quebec in the Dominion of Canada, having its principal office in the Transportation Building in the City of Montreal, Province of Quebec, Dominion of Canada, and is not a resident or citizen of the State of Ohio, nor does it maintain an office or place of business in the State of Ohio; that defendant Paris E. Singer resides at 1 bis Place des Vosges, Paris, France, and is not a resident of the State of Ohio; that service of summons cannot be made upon said defendants, or either of them, in the State of Ohio; that this action is one in which it is sought by provisional remedies of attachment and/or garnishment to take and to appropriate property of said defendants, Devon Syndicate, Ltd., and Paris E. Singer, in the possession of others and within the jurisdiction of this court, and subject same to the satisfaction of plaintiff's claim, and comes within the provisions of General Code Section 11292 of the laws of Ohio, wherein service by publication may be made on said defendants.

Horton C. Rorick.

Sworn to before me and subscribed in my presence this 10th day of October, 1930.

D. W. Drennan,

(Seal)

Notary Public, Lucas County, Ohio,

My commission expires Aug. 9, 1933.

On the 11th day of October, 1930, as appears by the appearance Docket of said Court, a Notice was filed and mailed Paris E. Singer, 1 bis Place des Vosges, France.

On the 11th day of October, 1930, as appears by the Appearance Docket of said Court, a Notice was filed and mailed Devon Syndicate, Ltd., Transportation Building, Montreal, Quebec, Canada.

*Certified Copy of Record*

On the 15th day of November, 1930, there was filed in said Court a Notice and Affidavit of Publication in the above entitled cause, which Notice and Affidavit is in the words and figures, as follows, to-wit:-

**IN THE COURT OF COMMON PLEAS****LEGAL NOTICE**

Fraser, Hiatt, Wall & Effler, Attys.  
710 Home Bank Bldg.

Devon Syndicate, Ltd., a foreign corporation organized and existing under the laws of the Province of Quebec, Dominion of Canada, and having its principal office and place of business in the Transportation Building in the City of Montreal, Province of Quebec, Dominion of Canada, and Paris E. Singer, 1 bis Place des Vosges, Paris, France, will take notice that on the 19th day of June, 1930, the plaintiff, Horton C. Rorick, filed his petition against them in the Court of Common Pleas of Lucas County, Ohio, the same being Cause No. 121340, for the procurement by plaintiff against said defendants of a judgment for money for services rendered, based upon contract, all of which is more fully set forth in plaintiff's petition.

The prayer of said petition is for judgment in favor of plaintiff and against said defendants, Devon Syndicate, Ltd., and Paris E. Singer, in the sum of Four Hundred Thousand Dollars (\$400,000.00), with interest thereon at the rate of six per cent (6%) per annum from the 12th day of June, 1930, and for costs of suit.

Said defendants, and each of them, are required to answer said petition on the 6th day of December, 1930, or judgment will be taken against them.

Horton C. Rorick, Plaintiff,  
By Fraser, Hiatt, Wall & Effler,  
His Attorneys.

Toledo, Ohio, October 10, 1930.

*Certified Copy of Record*

## PROOF OF PUBLICATION

The State of Ohio, County of Lucas, ss.

/ H. J. Chittenden, being first duly sworn, says that he is the General Manager of The H. J. Chittenden Company, the publisher and printer of Toledo Legal News, a daily newspaper, printed and of general circulation in said Lucas County, Ohio; that no weekly edition of said newspaper is published; that the annexed notice was published in said Toledo Legal News, once each week for 6 consecutive weeks, beginning on the 11 day of October, 1930, and that each insertion of said notice in said newspaper was on the same day of each week.

H. J. Chittenden.

Subscribed in my presence and sworn to before me this 15 day of November, 1930.

(Seal)

Winifred Murray

Notary Public in and for Lucas County, Ohio.

On the 5th day of December, 1930, there was filed in said Court a Notice of Removal in the above entitled cause, which Notice is in the words and figures as follows, to-wit:-

## IN THE COURT OF COMMON PLEAS

## NOTICE OF REMOVAL

The plaintiff will take notice that the defendants have prepared a petition and bond for the removal of this cause to the District Court of the United States for the Northern District of Ohio, Western Division, which Petition and bond said defendants will file herein and present to said Court of Common Pleas of Lucas County, Ohio, in which said action is pending, on the 5th day of December, 1930, at 9 A. M. True copies of said petition and bond are hereto attached.

Hornblower, Miller & Garrison,  
Tracy, Chapman & Welles,  
Attorneys for Defendants.

A copy of this notice, with copies of petition and bond for removal, has been received this 4th day of Dec. 1930 by the undersigned, counsel for the plaintiff herein.

Fraser, Hiatt, Wall & Effler,  
Attorneys for Plaintiff.

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On the 5th day of December, A.D. 1930, Defendants by their attorneys, filed in said Court a Petition for Removal of said cause to the United States District Court for the Northern District of Ohio, Western Division, which petition for Removal is in the words and figures as follows, to-wit:-

## IN THE COURT OF COMMON PLEAS

## PETITION FOR REMOVAL

Petitioners herein, being the defendants in the above entitled action, appearing specially for the purpose of this petition only and, not intending thereby to waive any question of the sufficiency of service of process or the want of service of process on them or either of them, but expressly reserving all questions of service of process, jurisdiction and want of service of process on them or either of them, and not entering or intending to enter their appearance herein, either jointly or separately or for either of them, respectfully show to this Honorable Court that the controversy herein is one wholly between a citizen and resident of the State of Ohio and citizens and subjects of foreign States; that the matter in controversy herein exceeds, exclusive of interest and costs, the sum of value of Five Thousand Dollars (\$5000); that the suit is one of a civil nature at common law; and does not arise under an act of the United States of America entitled, "An act relating to the liability of common carriers by railroad to their employes in certain cases," approved April 22, 1908, or any amendment thereto, now Sections 51 to 59 of title 45 of the Code of Laws of the United States of America.

Said petitioners say that said suit was filed in this said court June 19, 1930, and that service of summons on the defendants herein was returned "not found". That plaintiff then sought by attachment and garnishment to seize property of defendants and thereupon, to-wit, on the 10th day of October, 1930, filed an affidavit in the attempt to make service by publication on said defendants and caused publications thereof to be issued. That the time within which defendants are required to appear and plead, answer or demur as stated in said notice and as provided by the laws of the State of Ohio, or any rule of this court, is the 6th day of December, 1930, and that said time has not yet expired.

Said petitioners further represent to the Court that at the time said suit was commenced, and at all times



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thereafter, defendant, petitioner herein, Devon Syndicate, Limited (whose name is erroneously stated in plaintiff's petition herein to be Devon Syndicate, Ltd.) was and now is a corporation organized and existing under the laws of the Dominion of Canada, having its principal office in the Transportation Building in the City of Montreal, Province of Québec, Dominion of Canada, and that said defendant, petitioner herein, was and is a citizen of the Dominion of Canada and a subject of Great Britain and was and is an alien and not a citizen of the United States of America nor a citizen or resident of the State of Ohio nor of any other state of the United States of America; that defendant, petitioner herein, Paris E. Singer, is an individual and at the time said suit was commenced and at all times thereafter resided and now does reside at No. 1 Bis Place Des Vosges, Paris, France, and was and now is a citizen and subject of Great Britain and was and is an alien and not a citizen of the United States of America and was not and is not a citizen or resident of the State of Ohio, nor of any other state of the United States of America.

Petitioners further state that plaintiff, Horton C. Rorick, at the time said suit was filed and at all times thereafter was and now is an individual residing in the City of Toledo, Lucas County, Ohio, and is a citizen and resident of the State of Ohio.

Petitioners further state that the said cause is brought by plaintiff herein, Horton C. Rorick, to recover from said defendants the sum of Four Hundred Thousand Dollars (\$400,000.00) that plaintiff alleges to be due from said defendants by reason of services claimed by plaintiff to have been performed by plaintiff for and on behalf of defendants in the State of Florida, under alleged contracts by which plaintiff claims he was to be paid for said services whatever sum plaintiff should determine was the value thereof; that both of petitioners are actually interested in said controversy and your petitioners desire to remove said suit to the District Court of the United States for the Northern District of Ohio, Western Division.

Petitioners herewith file a good and sufficient bond under the statutes in such cases made and provided conditioned as the law directs that they will within thirty (30) days from the filing of the petition for removal file a certified copy of the record of this cause to the District Court of the United States for the Northern District of Ohio, Western Division, and for the payment of all costs

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which may be awarded by said court if said the District Court shall determine this suit is improperly and wrongfully removed thereto.

Wherefore your petitioners pray that this cause proceed no further herein except to order a removal of this cause to the said District Court of the United States for the Northern District of Ohio, Western Division, as required by law and to accept the bond herewith presented and direct the clerk of this court to provide a certified transcript of the record of this cause as required by law.

Hornblower, Miller & Garrison,  
Tracy, Chapman & Welles,  
Attorneys for Defendants.

State of Ohio, Lucas County, ss.

Geo. D. Welles, being first duly sworn, on his oath, says that he is a member of the firm of Tracy, Chapman & Welles, and is one of the attorneys for the defendants in the above entitled action; that the correct name of the defendant, Devon Syndicate, Ltd., is Devon Syndicate, Limited, and that said defendant is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, and that no officer of said defendant is now within the State of Ohio; and that defendant, Paris E. Singer, is an individual, residing in Paris, France, and is a citizen of Great Britain; that neither of said defendants is a resident of Lucas County, Ohio, or of the State of Ohio; that defendant, Paris E. Singer, is not now within the State of Ohio; that he has read the foregoing petition for removal and that the facts stated therein are true.

Geo. D. Welles.

Sworn to before me and subscribed in my presence this 4th day of December, 1930.

J. H. Beatty,

(Seal)

Notary Public, Lucas County, Ohio.

My commission expires Aug. 16, 1931.



*Certified Copy of Record*

On the 5th day of December, 1930, there was filed in said court a Bond for Removal of said cause to the United States District Court for the Northern District of Ohio, Western Division, which Bond for Removal is in the words and figures as follows, to-wit:

## IN THE COURT OF COMMON PLEAS

## BOND ON REMOVAL

Know all men by these presents that Devon Syndicate, Limited (whose name is erroneously stated in plaintiff's petition in the above entitled action to be Devon Syndicate, Ltd.), a corporation organized and existing under the laws of the Dominion of Canada, and Paris E. Singer, an individual residing at No. 1 Bis Place Des Vosges, Paris, France, as principals, and National Surety Company, as surety, are held and firmly bound unto Horton C. Rorick, plaintiff in the above entitled action, his successors and assigns in the sum of Five Hundred Dollars (\$500.00) lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves and our successors jointly and severally by these presents.

The condition of this obligation is such that whereas said Devon Syndicate, Limited, and Paris E. Singer have made and filed their petition, duly verified, in the above entitled suit in the Court of Common Pleas of Lucas County, Ohio, and have so filed the same prior to the time said defendants or either of them, as required by the laws of the State of Ohio or any rule of said State court, in which said suit has been brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of the above entitled suit into the District Court of the United States for the Northern District of Ohio, Western Division, being the District where such suit is pending, for further proceedings on grounds in said petition set forth, and have in said petition prayed that all future proceedings in said action in said Court of Common Pleas of Lucas County, Ohio, be stayed, except the granting of an order for the removal of said cause to said District Court of the United States, accepting this bond and directing the Clerk to provide a certified transcript of the record therein, as required by law.

Now, therefore, if petitioners, the said Devon Syndicate, Limited, and Paris E. Singer, shall enter or cause to be entered in said District Court of the United States

*Certified Copy of Record*

for the Northern District of Ohio, Western Division, within thirty (30) days from the date of filing said petition for removal, a certified copy of the record in said suit and shall pay or cause to be paid all costs that may be awarded by the said District Court of the United States, if said District Court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to remain in full force and effect.

Witness our hands and seals this 4th day of December, 1930.

(L.S.)      Devon Syndicate, Limited, Principal,  
By Geo. D. Welles,  
Attorney in fact and of record.

(L.S.)      Paris E. Singer, Principal,  
By Geo. D. Welles,  
Attorney in fact and of record.

(Seal)      National Surety Company, Surety,  
By H. M. Hayden, Attorney-in-Fact.

Dec. 5, 1930. Approved as to form and sufficiency.  
Gosline, J.

## IN THE COMMON PLEAS COURT

## AFFIDAVIT

State of Ohio, County of Lucas, ss.

Geo. D. Welles, being first duly sworn, says that he has been duly and expressly authorized in writing by Devon Syndicate, Limited, and Paris E. Singer, the defendants in whose name, as principals, he has executed the foregoing bond on removal, to execute said bond in their names and on their behalf respectively.

Geo. D. Welles.

Sworn to before me and subscribed in my presence this 4th day of December, 1930.

(Seal)      J. H. Beatty,  
Notary Public, Lucas County, Ohio.  
My commission expires August 16, 1931.

*Certified Copy of Record*

On the 5th day of December, 1930, there was filed in said Court a Motion for Removal in the above entitled cause, which motion is in the words and figures as follows, to-wit:-

## IN THE COMMON PLEAS COURT

## MOTION FOR REMOVAL

Now come the defendants and appearing solely for the purpose of removing this said cause, and for no other purpose, and not intending thereby to waive any question of the sufficiency of service or the want of service on them or either of them, but expressly reserving all questions of service, jurisdiction and want of service on them or either of them, and not entering or intending to enter their appearance herein either jointly or separately, or for either of them, move the court for an order removing this said cause to the District Court of the United States for the Northern District of Ohio, Western Division, in accordance with the petition for removal filed herein.

Hornblower, Miller & Garrison,  
Tracy, Chapman & Welles,  
Attorneys for Defendants.

On the 5th day of December, 1930, being the 63rd day of the September Term, A. D. 1930, an Order in said cause was made, an entry of which appears on the Journal of said Court, in the words and figures as follows, to-wit:

This day this cause came on to be heard on the petition and motion of the defendants herein, both appearing specially for said purpose only, and for no other purpose, for the removal of this said cause from this court to the District Court of the United States for the Northern District of Ohio, Western Division, and the court, upon consideration of the same, and being fully advised in the premises, finds that said defendants have filed said petition for removal within the time provided by law and have at the same time offered their bond in the sum of Five Hundred Dollars (\$500.00) with good and sufficient surety, conditioned according to law, and the court further finds that notice required by law of the filing of said bond and petition prior to the filing thereof had been served upon the plaintiff herein, which notice the court

*Certified Copy of Record*

finds was sufficient and in accordance with the requirements of the law.

It is therefore ordered that this court does now hereby approve and accept said bond and said petition and does hereby order this cause to be removed to the District Court of the United States for the Northern District of Ohio, Western Division, pursuant to the statutes of the United States, that the Clerk of this court shall prepare and deliver to plaintiff a certified copy of the record of said suit, and that all other proceedings in this court be stayed, to which order the plaintiff herein excepts.

Gosline, J.

## COSTS

Clerk .....	\$16.15
Sheriff .....	6.51
Printer .....	18.21
Notaries .....	4.80
Legal News .....	1.35

Total.....\$47.02

## CERTIFICATE TO COMMON PLEAS RECORD

The State of Ohio, Lucas County, ss.

I, George E. Hardy, Clerk of the Court of Common Pleas within and for said County, and in whose custody the files, pleadings, journals, execution dockets, and seal of said court, are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing copy is taken and copied from the Records of the proceedings of the Court of Common Pleas within and for said county, and that said foregoing copy has been compared by me with the original record, and that the same is a correct transcript therefrom.

In testimony whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in Toledo, in said County, this 12th day of December, A. D. 1930.

(Seal)

George E. Hardy, Clerk.

**ANSWER OF THE SPITZER-RORICK TRUST & SAVINGS BANK, GARNISHEE**

(Filed Jan. 15, 1931)

Now comes The Spitzer-Rorick Trust & Savings Bank, a corporation duly organized and existing under the laws of Ohio, and for its answer as garnishee in the above entitled cause says:

(1) That said Spitzer-Rorick Trust & Savings Bank is indebted to the defendant, Devon Syndicate, Ltd., on two special deposit accounts for \$9,255.96 and \$20,258.42 respectively;

(2) That under date of February 1st, 1928, Defendant Devon Syndicate, Ltd., as the owner of all the capital stock of the Everglades Club Company, a corporation of the State of Florida, executed a certain contract entitled "Everglades Club Company Voting Trust Agreement" wherein said Devon Syndicate, Ltd., was called "Stockholders" and Horton C. Rorick, Albert V. Foster and Paris E. Singer were called "Voting Trustees".

In said Voting Trust Agreement Devon Syndicate, Ltd., represented that it was the then owner of all the shares of capital stock in said Everglades Club Company, amounting to One Thousand (1,000) shares of no par value. It was further provided therein that Certificates for said entire capital stock, after being properly endorsed, should be deposited with said Voting Trustees to be held for a period of Ten (10) years unless a certain event happened as therein provided, which event has not happened. Under the terms of said Voting Trust Agreement The Spitzer-Rorick Trust & Savings Bank was designated as the depository and agent of said Voting Trustees and it now holds as such depository and agent Certificates for the entire capital stock of the Everglades Club Company against which it has issued as agent for said Voting Trustees, Voting Trust Certificates, which Certificates are non-negotiable and are only transferable upon the books of the Voting Trustees as provided in said Voting Trust Agreement.

Under the terms of said Voting Trust Agreement there was duly issued to said Devon Syndicate, Ltd., in March 1928, a Voting Trust Certificate, which recited that said Devon Syndicate, Ltd., would be entitled to receive a Certificate, or Certificates, expressed to be fully paid for Five Hundred (500) shares of the no par value capital stock of said Everglades Club Company upon the termination of the said Voting Trust Agreement. Said

*Motion*

Agreement is still in full force and effect and said Devon Syndicate, Ltd., still owns said Voting Trust Certificate as shown by the records of said Voting Trustees in the possession of said Siptzer-Rorick Trust & Savings Bank.

The Spitzer-Rorick Trust and Savings Bank,  
By J. R. Easton, Vice-President.

State of Ohio, County of Lucas, ss.

J. R. Easton, being first duly sworn, says that he is the Vice-President of The Spitzer-Rorick Trust & Savings Bank and has read its foregoing answer as garnishee in the above entitled cause, and is duly authorized herein, and that the allegations therein contained are true as he believes.

J. R. Easton.

Sworn to before me and subscribed in my presence this 15th day of January, 1931.

(Seal) D. W. Drennan,  
Notary Public, Lucas County, Ohio.  
My commission expires Aug. 9, 1933.

**MOTION**

(Filed Jan. 26, 1931)

Now comes the defendant, Devon Syndicate, Limited, appearing specially for the purpose of this motion only and not intending thereby to submit itself to the jurisdiction of this court, and not waiving or relinquishing hereby any objections that said defendant may have to the jurisdiction of this court over the person of this defendant, and not entering or intending to enter an appearance herein, and moves the court for an order quashing the pretended service of summons and setting aside the return thereof as to said defendant and dismissing the pretended attachment and garnishment of said defendant's property by virtue whereof an attempt



*Motion*

to serve summons in said action on said defendant by publication was made, for the following reasons, to wit:

1. The affidavit by which said pretended attachment and garnishment was attempted to be obtained is defective and insufficient to support an attachment and garnishment and void for the reason that the notary before whom said affidavit was sworn is an attorney employed by the plaintiff and a firm of which plaintiff is a member and said notary is interested in the result of said action.

2. The affidavit by which said pretended attachment and garnishment was attempted to be obtained is defective and insufficient to support an attachment and/or garnishment and void for the reason that the affidavit does not comply with the terms of Ohio General Code Sections 11828 and 11820.

3. There is not and was not at the time the pretended levy of attachment and garnishment was made in the cause any property of this defendant within the jurisdiction of this court or of the Court of Common Pleas of Lucas County, Ohio, out of which said attachment process issued, on which any valid attachment could be or was levied.

4. There is not and was not at the time the pretended levy of attachment and garnishment was made in this cause any property of this defendant in the possession of any of the garnishees herein within the jurisdiction of this court or of the Court of Common Pleas of Lucas County, Ohio, out of which said attachment and garnishment process issued which has been seized or levied upon by said process.

5. There is not and was not at the time the pretended levy of attachment and garnishment was made in this cause, any property jointly owned by defendants herein or any property in which both of said defendants had any right, title or interest, within the jurisdiction of this court or of the Court of Common Pleas of Lucas County, Ohio, out of which said attachment process issued, or in the possession of any of the garnishees herein, within the jurisdiction of this court or of said Court of Common Pleas of Lucas County, Ohio, or subject to seizure or which has been seized or levied upon by said process.

6. The attempted attachment and garnishment of property of this defendant and the attempted service of process upon it by publication and mailing of notice are and were all void and of no effect for the reason, among others, that this defendant is a corporation, incorporated

*Order*

under the first part of Chapter 79 of the Revised Statutes of Canada, 1906, known as the "Companies' Act," and amending acts, and that the correct name of this defendant is Devon Syndicate, Limited, whereas in plaintiff's petition and in the affidavits in attachment and garnishment herein, and in the affidavit for constructive service, and in the notice to this defendant, service of which was attempted by publication and mailing, this defendant was described as an alleged to be a corporation organized and existing under the laws of the Province of Quebec, in the Dominion of Canada; named Devon Syndicate, Ltd., and no service of process has been served upon, and no publication of notice of attachment and garnishment has been made directed to, this defendant, and there is no corporation of the name of Devon Syndicate, Ltd., or Devon Syndicate, Limited, organized or incorporated under the laws of the Province of Quebec, in the Dominion of Canada.

7. There has been no lawful service of summons made upon this defendant by publication or otherwise.

Hornblower, Miller, Miller & Boston,

Tracy, Chapman & Welles,

Attorneys for Devon Syndicate, Limited.

Copy of foregoing motion delivered to Fraser, Hiatt, Wall & Effler this 26th day of January, 1931.

Tracy, Chapman & Welles.

**ORDER**

(Filed Feb. 17, 1936)

Leave is hereby granted the plaintiff to file instanter his supplemental and amended petition and supplemental affidavit in garnishment, on which an order of attachment may issue in accordance with law.

Geo. P. Hahn,

U. S. District Judge.



**SUPPLEMENTAL AND AMENDED PETITION**

(Filed Feb. 17, 1936)

Now comes the plaintiff, and with leave of court first obtained files this, his supplemental and amended petition.

For his cause of action herein, plaintiff says that the defendant, Devon Syndicate, Limited (also sometimes known as Devon Syndicate, Ltd.), is a corporation organized and existing under the laws of the Dominion of Canada, the last known address of its principal office and place of business being Transportation Building, in the City of Montreal, Province of Quebec, Dominion of Canada; that the defendant, Paris E. Singer, is a non-resident of the State of Ohio; that prior to January 1, 1926, he caused to be incorporated said defendant, Devon Syndicate, Limited, and transferred to said corporation a large portion of his assets; that he owns or controls all of the capital stock of the corporation, Devon Syndicate, Limited, and is president and managing officer thereof.

Plaintiff says that the said Paris E. Singer either through his ownership or control of all of the stock of Devon Syndicate, Limited, is and has been, and was at the times hereinafter referred to, in actual control of various corporations, among them the Palm Beach Ocean Realty Company; the Ocean and Lake Realty Company; Everglades Club Hotel and Apartment Company; and The Highland Glades Farms Company; and the said Paris E. Singer is, and was at the times hereinafter complained of, very heavily interested in all of said corporations.

On or about April 8, 1926, the defendant, Paris E. Singer, made a written contract with the plaintiff, wherein and whereby this plaintiff continued to be employed by said Singer for the calendar years 1926 and 1927, as financial adviser for the said Singer, and for all of the corporations controlled by the said Singer, including Devon Syndicate, Limited, Palm Beach Realty Company, The Ocean and Lake Realty Company, Everglades Club Hotel and Apartment Company and The Highland Glades Farms Company, and under and by virtue of the terms of said agreement, which was accepted by the plaintiff, it was provided that the services to be rendered by the plaintiff would largely be of an advisory nature, and they were not in any way to conflict with plaintiff's duty as a partner in Spitzer Rorick and Company; and it was also agreed that the amount of compensation to be paid

*Supplemental and Amended Petition*

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plaintiff should be fixed exclusively by the plaintiff, and the defendant, Singer, agreed to pay whatever amount was fixed by plaintiff with the limitation that the charge should not exceed Fifty Thousand Dollars per year and expenses for the calendar years 1926 and 1927.

Plaintiff says he accepted said contract and entered upon the performance of said duties, and it was then discovered by both parties that the services rendered and to be rendered were of vastly greater extent and value than was contemplated by either party at the time of the making of the contract of April 8, 1926; that plaintiff and defendant Singer thereupon and shortly thereafter agreed that plaintiff should assume and perform the additional duties requested by the defendant Singer, and the contract made on April 8, 1926, was modified as to the extent that the limitation of Fifty Thousand Dollars per year was expressly removed, and it was agreed that no limitation would be placed upon the value of the services to be rendered, and that plaintiff should and would have the right to fix the value of the services, and the amount of compensation to be paid, and defendant Singer agreed that said compensation as fixed by plaintiff would be paid to plaintiff.

Plaintiff says that the defendant, Devon Syndicate, Limited, in the month of August, 1926, agreed with the plaintiff that it would join with the defendant Singer in the employment and compensation to be paid to plaintiff for the services rendered, and to be rendered as aforesaid, and on or about March 12, 1927, the defendant, Devon Syndicate, Limited, ratified and approved said contract in writing, and upon said day, in writing, in consideration of services already rendered and to be rendered by the plaintiff to said defendants and to affiliated corporations hereinbefore named, and other corporations owned and controlled by Devon Syndicate, Limited, agreed that it would pay to the plaintiff for services whatever amount the plaintiff should fix as the value thereof, and in such amounts and on such dates as in the sole discretion of the plaintiff would be fixed. It was the intent of the plaintiff and the defendants that the services rendered and to be rendered by the plaintiff referred to in both of said written contracts would be the same services and would be rendered to the said defendants, and all of the interests or corporations owned or controlled by the defendants.

Plaintiff says that following the expiration of the year 1927, he continued performing the same services for

*Supplemental and Amended Petition*

the defendants as aforesaid, by and with their full consent and approval down to the 12th day of June, 1930, at which time he resigned; that during all of said time, down to the 12th day of June, 1930, plaintiff fully performed his contracts, and rendered services as financial adviser and otherwise in connection with the properties aforesaid to the full satisfaction and approval of the defendants; that during the period of employment and down to the time of his resignation, plaintiff devoted a very large amount of time to the work involved, and handled assets of the defendants estimated by them to be of more than Twenty Million Dollars in value, and by reason of his efforts, the properties of the defendants and the other corporations which were intricately involved, were largely saved for the defendants, and the other interested corporations, and his services, during all of said time, were accepted by the defendants and by them in every way ratified, confirmed and approved.

Plaintiff says that acting under the provisions of his contracts aforesaid, he has fixed the value of his services rendered under his employment in the amount of Four Hundred Thousand (\$400,000.00) Dollars in addition to expenses and credits received by plaintiff in connection with the performance of his duties under said contracts, and there is due him by virtue of said contracts of employment, the sum of Four Hundred Thousand (\$400,000.00) Dollars, together with interest at six per cent (6%) per annum from the 12th day of June, 1930. Said services did not include any services rendered as a partner of Spitzer Rorick and Company or as an officer of The Spitzer Rorick Trust & Saving Bank.

Wherefore, plaintiff prays judgment against said defendants, and each of them, for the sum of Four Hundred Thousand (\$400,000.00) Dollars with interest thereon at the rate of six per cent (6%) per annum from the 12th day of June, 1930.

Fraser, Effler, Shumaker & Winn,  
Attorneys for Plaintiff.

State of Ohio, County of Lucas, ss.

Horton C. Rorick, being first duly sworn, says that he is the plaintiff in the above entitled action; that he has read the foregoing supplemental and amended petition; and the allegations contained therein are true as he believes.

Horton C. Rorick.

*Supplemental and Amended Petition*

Sworn to before me and subscribed in my presence  
this 23rd day of January, 1926.

(Seal) Caroline McLaughlin,  
Notary Public, Lucas County, Ohio.

**PRAECIPE**

To the Clerk:

Please issue summons in the above entitled action for the defendants, addressed to the United States marshal, for the Northern District of Ohio, returnable according to law, endorsed: "Amount claimed, \$400,000.00 with interest at 6% per annum from June 12, 1930."

Also issue order of garnishment and attachment addressed to the United States marshal, for the Northern District of Ohio, to be served upon The Spitzer Rorick Trust and Savings Bank, 315 Superior Street, Toledo, Ohio; Horton C. Rorick and The Spitzer Rorick Trust and Savings Bank, Trustees, 315 Superior Street, Toledo, Ohio; The Everglades Club Company, 315 Superior Street, Toledo, Ohio; and The Blue Heron Land Company, 315 Superior Street, Toledo, Ohio, commanding each of said persons and corporations to answer concerning monies, properties and other assets in their hands or under their control belonging to the defendants, Devon Syndicate, Limited, and/or Paris E. Singer.

Fraser, Effler, Shumaker & Winn,  
Attorneys for Plaintiff.

**SUPPLEMENTAL AFFIDAVIT IN GARNISHMENT**

(Filed Feb. 17, 1936)

State of Ohio, County of Lucas, ss.

Horton C. Rorick, being first duly sworn, says that he is the plaintiff in the above captioned suit; that he heretofore commenced a civil action in the Court of Common Pleas of Lucas County, Ohio, against Devon Syndicate, Limited, a corporation, also sometimes known as Devon Syndicate, Ltd., and Paris E. Singer on a debt arising upon contract, being an action to recover from defendants certain moneys due and owing to plaintiff herein under and by virtue of certain contracts between plaintiff and defendants, and the breach and refusal to perform thereof by defendants; that the said action was removed from said Court of Common Pleas of Lucas County and is now pending in the said United States District Court, for the Northern District of Ohio, Western Division; that said claim is just and that plaintiff should recover thereon from defendants the sum of Four Hundred Thousand Dollars (\$400,000.00) with interest at the rate of six per cent (6%) per annum from June 12, 1930.

Affiant further says that he has good reason to believe and does believe that The Spitzer-Rorick Trust & Savings Bank, a banking corporation of Ohio, with its principal office in the City of Toledo, Ohio, Horton C. Rorick, Albert V. Foster and Paris E. Singer, as Trustees, the Everglades Club Company and the Blue Heron Land Company have moneys, property and assets of defendant, Devon Syndicate, Limited, and/or defendant Paris E. Singer, in their possession and control due and payable or to become due and payable to either one or both of said defendants. Without limiting the generality of the foregoing, affiant says that he has good reason to believe and does believe that The Spitzer-Rorick Trust & Savings Bank is indebted to Devon Syndicate, Limited, on two special deposit accounts for Nine Thousand Two Hundred Fifty-five Dollars and Ninety-six Cents (\$9,255.96) and Twenty Thousand Two Hundred Fifty-eight Dollars and Twenty-four Cents (\$20,258.24), respectively; that the Spitzer-Rorick Trust & Savings Bank has in its possession, as depository for Horton C. Rorick and Albert V. Foster, constituting a majority of three voting trustees under a voting trust agreement dated February 1, 1928, five hundred (500) shares of the capital stock of the Everglades Club Company, for which said



*Supplemental Affidavit in Garnishment*

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voting trustees have issued to Devon Syndicate, Limited, a voting trust certificate representing said five hundred (500) shares; that The Spitzer-Rorick Trust & Savings Bank, trustee under an agreement between Spitzer-Rorick Trust & Savings Bank, trustee under an agreement between Spitzer-Rorick Trust & Savings Bank and Devon Syndicate, Limited, dated March 16, 1927, has collected for the benefit of and is indebted to Devon Syndicate, Limited, in the amount of Seventeen Thousand Five Hundred Seventy-six Dollars and Eight Cents (\$17,576.08) as of January 24, 1936, and for such additional amounts as may have been collected under the terms of said agreement subsequent to said date, and in addition is holding as trustee under said agreement Certificate No. 4 for ten (10) shares of the capital stock of the Lake Country Club Estates, Inc., a Florida corporation, in trust for said defendant, Devon Syndicate, Limited?

Affiant further says that the Everglades Club Company is indebted to the said Devon Syndicate, Limited, in the sum of Forty-four Thousand Eight Hundred Ninety-eight Dollars and Twenty Cents (\$44,898.20) with interest, representing the balance due on a note for Two Hundred Thousand Dollars (\$200,000.00), and that it is further indebted to Devon Syndicate, Limited, in the sum of Two Hundred Fifty Thousand Dollars (\$250,000.00) on five promissory notes dated March 22, 1928, and payable respectively on or before March 30, 1929, 1930, 1931, 1932 and 1933; that on July 24, 1926, the Everglades Club Company specifically assumed and agreed to pay One Million Two Hundred Fifty Thousand Dollars (\$1,250,000.00) with interest thereon from May 1, 1927, on a note and mortgage of the Ocean & Lake Realty Company, a Florida corporation, which had been transferred and assigned to said The Spitzer-Rorick Trust & Savings Bank to secure an authorized bond issue of Two Million Two Hundred Fifty Thousand Dollars (\$2,250,000.00); that said Devon-Syndicate, Limited, is the owner of One Million Five Hundred Thousand Dollars (\$1,500,000.00) of the said bonds under the said bond issue, being bonds numbered 513 to 2012, both inclusive.

Affiant says that The Spitzer-Rorick Trust & Savings Bank, Albert V. Foster and Horton C. Rorick, as trustee, The Blue Heron Land Company and the Everglades Company should receive notice of garnishment herein.

Affiant further says that Devon Syndicate, Limited,



*Supplemental Affidavit in Garnishment*

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existing under the laws of the Dominion of Canada, with its principal office in the City of Montreal, Province of Quebec; that it is not for any reason, statutory or otherwise, exempted from attachment; that it has not filed with the Secretary of State of the State of Ohio a statement required by General Code, section 8625-5, nor procured from said Secretary of State the license provided for by General Code, Section 8625-4; that it is not within the exceptions contained in Division 1 of the General Code, Section 11819, nor was it at the time of the occurrences referred to in the petition in this case, nor is it now qualified by law to do business in the State of Ohio; that the defendant, Paris E. Singer, is not a resident of this state and cannot be served with summons in this state; and that the facts set forth in this affidavit are true.

Horton C. Rorick.

Sworn to before me and subscribed in my presence  
this 23rd day of January, 1936.

(Seal)

Caroline McLaughlin,  
Notary Public, Lucas County, Ohio.

**RETURN OF THE MARSHAL**

(Filed Feb. 26, 1936)

Received this order of attachment on the 17th day of February, 1936, and agreeable to the command thereof, I served the Everglades Club Company, 315 Superior Street, Toledo, Ohio, the garnishee named in the order of attachment, by delivering a copy thereof to J. R. Easton, Secy. & Treas. of said garnishee, the President or other chief officer being absent from this District, together with a copy of the notice to garnishee, hereto attached, on the 18th day of February, 1936.

I also served The Blue Heron Land Company, 315 Superior Street, Toledo, Ohio, a garnishee named in the order of attachment, by delivering a copy thereof to Marvin H. Rorick, Secy. & Treas. of said garnishee, the president or other chief officer being absent from this District, together with a copy of the notice to garnishee, hereto attached, on the 18th day of February, 1936.

I also served The Spitzer-Rorick Trust & Savings Bank, 315 Superior Street, Toledo, Ohio, a garnishee named in the order of attachment, by delivering a copy thereof to Marvin H. Rorick, vice president of said garnishee, together with a copy of the written notice to garnishee, hereto attached, on the 18th day of February, 1936.

I also served The Spitzer-Rorick Trust & Savings Bank and Horton C. Rorick, Trustee, 315 Superior Street, Toledo, Ohio, garnishee named in the order of attachment, by delivering a copy thereof to Marvin H. Rorick, vice president of said The Spitzer-Rorick Trust & Savings Bank, together with a copy of the notice to garnishee, hereto attached, on the 18th day of February, 1936.

I also served Horton C. Rorick, 315 Superior Street, Toledo, Ohio, a garnishee named in the order of attachment, by leaving a copy thereof, together with a copy of the notice to garnishee, hereto attached, for him at 315 Superior Street, Toledo, Ohio, with Marvin H. Rorick, his son.

Jesse T. Gill, Deputy Marshal.

*Order of Attachment*

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**ORDER OF ATTACHMENT**

The United States of America,  
Northern District of Ohio, ss:  
The President of the United States of America,  
To the Marshal of the Northern District of Ohio—Greetings:

You are hereby commanded to attach the goods, chattels, stocks, interest in stocks, rights, credits, money and effects of said defendants, Devon Syndicate, Limited, and Paris E. Singer, in your district, not exempt by law from being applied to the payment of plaintiff's claim, or so much thereof as will satisfy said claim of Four Hundred Thousand Dollars (\$400,000.00) and interest, and the probable costs of this action, not exceeding Fifty Dollars (\$50.00); and make due return of this order with your proceedings had thereon by the 2nd day of March, 1936.

Witness, the Honorable Paul Jones, George P. Hahn, S. H. West, and John M. Killits, District Judges of the United States, this 17th day of February, A. D. 1936.

(Seal)

F. J. Denzler, Clerk,  
By George H. Blossom,  
Deputy Clerk.

*Notice to Garnishee***NOTICE TO GARNISHEE**

The United States of America,  
Northern District of Ohio, ss.

The President of the United States of America,  
To the Marshal of the Northern District of Ohio—Greetings:

You are hereby commanded to notify The Blue Heron Land Company, 315 Superior Street, to appear before the Honorable District Court of the United States, for the Northern District of Ohio, Western Division, at the Federal Building in Toledo, on or before the 25th day of April, 1936, and answer, under oath, all questions put to it touching the property of every description and credits of the defendants Devon Syndicate, Limited, and Paris E. Singer, or either of them in its possession or under its control, and it shall disclose truly the amount owing by it to said defendants, or either of them, whether due or not.

The Marshal will make due return of this writ on the 2nd day of March, 1936.

Witness, the Honorable Paul Jones, George P. Hahn, S. H. West and John M. Killits, District Judges of the United States, this 17th day of February, A. D. 1936.

F. J. Denzler, Clerk,

(Seal)

By George H. Blossom,  
Deputy Clerk.

*Notice to Garnishee*

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**NOTICE TO GARNISHEE**

The United States of America,  
Northern District of Ohio, ss:  
The President of the United States of America,  
To the Marshal of the Northern District of Ohio—Greetings:

You are hereby commanded to notify The Spitzer-Rorick Trust & Savings Bank, 315 Superior Street, to appear before the Honorable District Court of the United States, for the Northern District of Ohio, Western Division, at the Federal Building in Toledo, on or before the 25th day of April, 1936, and answer, under oath, all questions put to it touching the property of every description and credits of the defendants Devon Syndicate, Limited, and Paris E. Singer, or either of them in its possession, or under its control, and it shall disclose truly the amount owing by it to said defendants, or either of them, whether due or not.

The Marshal will make due return of this writ on the 2nd day of March, 1936.

Witness, the Honorable Paul Jones, George P. Hahn, S. H. West and John M. Killits, District Judges of the United States, this 17th day of February, A. D. 1936.

F. J. Denzler, Clerk,

(Seal).

By George H. Blossom,  
Deputy Clerk.

*Notice to Garnishee***NOTICE TO GARNISHEE**

The United States of America,  
Northern District of Ohio, ss.  
The President of the United States of America,  
To the Marshal of the Northern District of Ohio—Greetings:

You are hereby commanded to notify Horton C. Rorick and The Spitzer-Rorick Trust & Savings Bank, Trustees, 315 Superior Street, to appear before the Honorable District Court of the United States for the Northern District of Ohio, Western Division, at the Federal Building in Toledo, on or before the 25th day of April, 1936, and answer, under oath, all questions put to it touching the property of every description and credits of the defendants Devon Syndicate, Limited, and Paris E. Singer, or either of them in its possession, or under its control, and it shall disclose truly the amount owing by it to said defendants, or either of them, whether due or not.

The Marshal will make due return of this writ on the 2nd day of March, 1936.

Witness, the Honorable Paul Jones, George P. Hahn, S. H. West and John M. Killits, District Judges of the United States, this 17th day of February, A. D. 1936.

F. J. Denzler, Clerk,

(Seal)

By George H. Blossom,  
Deputy Clerk.



*Notice to Garnishee*

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**NOTICE TO GARNISHEE**

The United States of America,  
Northern District of Ohio, ss:  
The President of the United States of America,  
To the Marshal of the Northern District of Ohio—Greetings:

You are hereby commanded to notify the Everglades Club Company, 315 Superior Street, to appear before the Honorable District Court of the United States, for the Northern District of Ohio, Western Division, at the Federal Building in Toledo, on or before the 25th day of April, 1936, and answer, under oath, all questions put to it touching the property of every description and credits of the defendants Devon Syndicate, Limited, and Paris E. Singer, or either of them, in its possession, or under its control, and it shall disclose truly the amount owing by it to said defendants, or either of them, whether due or not.

The Marshal will make due return of this writ on the 2nd day of March, 1936.

Witness, the Honorable Paul Jones, George P. Hahn, S. H. West and John M. Killits, District Judges of the United States, this 17th day of February, A. D. 1936.

F. J. Denzler, Clerk,

(Seal)

By George H. Blossom,  
Deputy Clerk.

*Notice to Garnishee***NOTICE TO GARNISHEE**

The United States of America,  
Northern District of Ohio, ss:

The President of the United States of America,  
To the Marshal of the Northern District of Ohio—Greetings:

You are hereby commanded to notify Horton C. Rorick, 315 Superior Street, to appear before the Honorable District Court of the United States, for the Northern District of Ohio, Western Division, at the Federal Building, in Toledo, on or before the 25th day of April, 1936, and answer, under oath, all questions put to it touching the property of every description and credits of the defendants Devon Syndicate, Limited, and Paris E. Singer, or of either of them, in its possession, or under its control, and it shall disclose truly the amount owing by it to said defendants, or either of them, whether due or not.

The Marshal will make due return of this writ on the 2nd day of March, 1936.

Witness, the Honorable Paul Jones, George P. Hahn, S. H. West and John M. Killits, District Judges of the United States, this 17th day of February, A. D. 1936.

F. J. Denzler, Clerk,

(Seal)

By George H. Blossom,  
Deputy Clerk.

*Motion***MOTION**

(Filed April 11, 1936.)

Now comes the defendant, Devon Syndicate, Limited, appearing specially for the purpose of this motion only, and not intending thereby to submit itself to the jurisdiction of this court, and not waiving or relinquishing hereby any objections that said defendant may have to the jurisdiction of this court over the person of this defendant, and not entering or intending to enter an appearance herein, and moves the court for an order quashing the pretended service of summons on the plaintiff's supplemental and amended petition and setting aside the return thereof as to said defendant and dismissing the pretended attachment and garnishment of said defendant's property made on the supplemental affidavit in garnishment by virtue whereof an attempt to serve summons in said action on said defendant by publication was made, for the following reasons, to-wit:

1. There is not and was not at the time the pretended levy of attachment and garnishment was made under said supplemental and amended petition and supplemental affidavit in garnishment; any property of this defendant within the jurisdiction of this honorable court out of which said attachment process issued, on which any valid attachment could be or was levied.

2. There is not and was not at the time the pretended levy of attachment and garnishment was made on the supplemental and amended petition of plaintiff and supplemental affidavit in garnishment, any property of this defendant in the possession of any of the garnishees herein, within the jurisdiction of this honorable court, out of which said attachment and garnishment process issued, which has been seized or levied upon by said process.

3. There is not and was not at the time the pretended levy of attachment and garnishment was made under the supplemental and amended petition of plaintiff and the supplemental affidavit in attachment, any property jointly owned by defendants herein, or any property in which both of said defendants had any right, title or interest, within the jurisdiction of this honorable court, out of which said attachment process issued, or in the possession of any of the garnishees herein, within the jurisdiction of this honorable court or subject to seizure, or which has been seized or levied upon by said process.

4. There has been no lawful service of summons under the supplemental and amended petition made upon this defendant.

Supplemental Answer of Spitzer-Rorick Tr. & Savs. Bank

5. The pretended attachment and garnishment under said supplemental and amended petition and the supplemental affidavit in garnishment is void and of no effect, for the reason, among others, that it is an attempt to originate a proceeding in this honorable court against defendant and obtain an attachment of defendant's property without personal service of summons on this defendant.

6. This honorable court has no jurisdiction either of property or person giving jurisdiction for the maintenance of the said action against this defendant.

Miller, Owen, Otis & Bailly,  
Welles, Kelsey & Cobourn,  
Attorneys for Devon Syndicate,  
Limited,

We acknowledge receipt of a copy of the foregoing motion this 11th day of April, 1936.

Fraser, Effler, Shumaker & Winn,  
Attorneys for Plaintiff.

**SUPPLEMENTAL ANSWER OF THE SPITZER-  
RORICK TRUST & SAVINGS BANK  
AS GARNISHEE**

(Filed April 22, 1936.)

Now comes The Spitzer-Rorick Trust & Savings Bank, a banking corporation duly organized and existing under the laws of Ohio, and for its supplemental answer as garnishee to its answer filed in the above entitled cause on or about January 15, 1931, says:

1. That it still holds the two special deposits for \$9,255.96 and \$20,258.42 respectively, made by defendant Devon Syndicate, Ltd., and described in the answer of this garnishee filed herein on or about January 15, 1931, and which it is still holding under the order of attachment heretofore issued herein to this garnishee.

*Supplemental Answer of Spitzer-Rorick Tr. & Savs. Bank*

2. That at the time of the commencement of the above entitled action on or about June 19, 1930, this garnishee held as trustee and agent for the defendant Devon Syndicate, Ltd., a certain note and mortgage hereinafter described but on which no collections had been made at the time this garnishee filed its answer herein on or about January 15, 1931; however, a substantial amount was collected thereon during the year 1935, and this answering garnishee now has in its possession the sum of \$17,516.08 belonging to defendant Devon Syndicate, Ltd., subject to and covered by the attachment and garnishment served on this garnishee on or about July 1, 1930.

The above mentioned note, mortgage, assignment and declaration of trust are more fully described as follows:

On or about August 3, 1926, Lake Country Club Estates, Inc., a corporation organized and existing under and by virtue of the laws of the State of Florida, executed its promissory note for \$575,000.00 payable to the order of said Devon Syndicate, Ltd., a true copy of which note is attached to the affidavit of Paris E. Singer filed herein on or about May 1, 1931, in support of motion of Devon Syndicate, Ltd., that in order to secure the payment of interest and principal of said note, said Lake Country Club Estates, Inc., on or about the date of said note, executed and delivered to Devon Syndicate, Ltd., its mortgage upon certain lands and tenements and other properties, all of which were located in Palm Beach County, State of Florida, which said mortgage was recorded in the office of the Clerk of the Circuit Court of Palm Beach County, State of Florida, in Mortgage Book 204 at page 93; that on March 16, 1927, Devon Syndicate, Ltd., sold, transferred and assigned said note and all monies due and to grow due thereon with interest, to this garnishee, The Spitzer-Rorick Trust & Savings Bank, without recourse, the form of said endorsement being also shown in said Exhibit "B" attached to the affidavit of Paris E. Singer; that on March 16, 1927, said mortgage, together with the promissory note described therein and the monies due and to thereafter become due thereon with interest, were duly sold, transferred and assigned by defendant Devon Syndicate, Ltd., to The Spitzer-Rorick Trust and Savings Bank by duly executed written assignment, a true copy of which is attached to the said affidavit of Paris E. Singer and marked Exhibit "C."

That simultaneously with said transfers, The Spitzer-Rorick Trust & Savings Bank executed a Declaration of Trust acknowledging said transfers and setting forth



*Supplemental Answer of Spitzer-Rorick Tr. & Savs. Bank*

the terms and conditions upon which said note and mortgage were to be held by said bank, that a true copy of said Declaration of Trust is attached to the said affidavit of Paris E. Singer as Exhibit "D."

That in June, 1935, the said Spitzer-Rorick Trust & Savings Bank consummated a transaction under which it realized or collected on account of said trusteeship and agency the sum of \$17,576.08 over and above the expenses and charges of the said Trustee and its attorneys under said trust, and has since held said amount for the defendant Devon Syndicate, Ltd., subject to the attachment and garnishment issued in this case and served on this answering garnishee on or about July 1, 1930.

This garnishee further states that all of the above transactions and many others involving large amounts with the defendant Devon Syndicate, Ltd., were transacted and made by said defendant in the name of "Devon Syndicate, Ltd.," and that all contracts, documents and letters in connection therewith were executed by the defendant Paris E. Singer as the president of "Devon Syndicate, Ltd.,"; that the corporation described, in the affidavits of Paris E. Singer filed herein, as "Devon Syndicate, Limited," is one and the same corporation described in the petition filed herein and in the Exhibits attached to the said affidavit of Paris E. Singer as "Devon Syndicate, Ltd.," the latter being the name under which Devon Syndicate, Limited, transacted business in Ohio, Florida and other states in the United States.

3. That this answering garnishee is still the depository under a certain contract entitled "Everglades Club Company Voting Trust Agreement" described in the answer of this garnishee filed herein on or about January 15, 1931, and still holds, as therein set forth, all the shares of capital stock in the Everglades Club Company, a Florida corporation, amounting to 1,000 shares of no par value, but that by virtue of certain proceedings instituted on August 24, 1933, by The Spitzer-Rorick Trust & Savings Bank and H. C. Rorick, as Trustees under the first mortgage of the Everglades Club Company dated February 1, 1928, in the District Court of the United States for the Southern District of Florida, in Equity No. 1207 M, said first mortgage was foreclosed and all of the assets of the Everglades Club Company have since been sold, and the entire equity represented by said capital stock has been wiped out so that in the opinion of this garnishee said stock and the voting certificates issued in connection therewith are now worthless and of no value.

The Spitzer-Rorick Trust & Savings Bank,  
By J. R. Easton, Vice-President.



*Memorandum Opinion*

State of Ohio, County of Lucas, ss:

J. R. Easton, being first duly sworn, says that he is a vice-president of The Spitzer-Rorick Trust & Savings Bank and has read its foregoing supplemental answer as garnishee in the above entitled cause; that he is duly authorized herein, and that the statements therein contained are true as he believes.

J. R. Easton.

Sworn to before me and subscribed in my presence this 21st day of April, 1936.

(Seal) Richard B. Swartzbaugh,  
Notary Public, Lucas County, Ohio.  
My commission expires Nov. 17, 1937.

**MEMORANDUM OPINION**

(Filed June 24, 1936.)

Hahn, J.:

On the oral argument of the motion to dissolve and dismiss the attachment and garnishment herein, it appeared that the defendant, Paris E. Singer, had died pending this action. The plaintiff announced that the action hereafter would proceed against the defendant Devon Syndicate, Ltd., alone.

The prior proceedings, which it is necessary to have in mind upon the motion of Devon Syndicate, Ltd., are as follows: (1) Petition filed in the Court of Common Pleas of Lucas County, Ohio, June 19, 1930; affidavit in attachment and garnishment filed in said court June 19, 1930; (2) second affidavit in attachment and garnishment filed in said court on the 27th of June, 1930. Both of these said affidavits were sworn and subscribed to by the plaintiff, Horton C. Rorick, before D. W. Drennar, who, it is claimed, was disqualified from administering said oath as will hereinafter appear. The said cause was duly removed to this court, and, on the 17th day of Feb-

*Memorandum Opinion*

ruary, 1936, (3) a supplemental and amended petition was filed in this court, and on the same day there was filed in this court a supplemental affidavit in attachment.

The defendant, Devon Syndicate, Ltd., specially appearing for that purpose, has moved the court to dissolve, dismiss and discharge the attachment and garnishment proceedings, based upon the two affidavits filed in the Court of Common Pleas of Lucas County, Ohio. The grounds of the motion are:

That the affidavits filed in the state court were insufficient under the statute, General Code Sec. 11828, for the reason that they did not allege:

(a) That the plaintiff *believed* that the garnishees had property of the defendant;

(b) That it did not *describe* the property within the meaning of the statute.

It is also claimed that the garnishment proceedings are void and of no effect, because the above two affidavits were sworn to before D. W. Drennan.

As to the proceedings in the court, the defendant filed a motion to quash the service on plaintiff's supplemental and amended petition, and to dismiss the pretended attachment and garnishment proceedings had in this court.

I have reached the conclusion that the attachment and garnishment based upon the two affidavits filed in the Court of Common Pleas of Lucas County, Ohio, must be discharged. I cannot escape the conclusion that Mr. Drennan was not qualified to administer the oath to the plaintiff. It appears from his testimony that he is admitted to practice in the state of Ohio and has been admitted to practice in this court. He was admitted to practice in 1916, and practically since that time has been in the employ of Spitzer-Rorick & Company, either as a partnership or as a corporation. The plaintiff has been a partner and president of Spitzer-Rorick & Company, and has occupied a place of such prominence that his name has been carried in the firm.

Under the law of Ohio, General Code Section 11523, an affidavit may be used to obtain a provisional remedy such as an attachment or a garnishment. An affidavit may be made before any person authorized to take depositions, General Code Section 11524; and Section 11532 provides: "The officer before whom depositions are taken must not be a relative or attorney of either party or *otherwise interested* in the event of the action or proceeding." (*Italics supplied.*)

It follows that as the law stood at the time the two

*Memorandum Opinion*

affidavits were filed in the state court, a notary was not qualified to take an affidavit unless he would also have been qualified to preside at the taking of depositions on behalf of the party whose affidavit he was taking. Mr. Drennan was an attorney for the partnership of which Mr. Rorick was a prominent member. He was later employed by a corporation of which Mr. Rorick was president. His livelihood depended in a large measure upon the good will of Mr. Rorick. I think he was sufficiently interested in any matter in which Mr. Rorick had a personal interest to disqualify him from presiding impartially at the taking of depositions. I do not think the courts should pronounce their benediction upon a practice which would permit one circumstanced as was Mr. Drennan to preside at the taking of depositions.

It required a statute in Ohio to enable an attorney as a notary to verify pleadings on behalf of his client. General Code, Sec. 11356. See the following authorities: Leavitt, etc., vs. Rosenberg, etc., 83 O.S. 230; Evans vs. Lawyer, 123 O.S. 62, 66; Rhinelander Paper Co. vs. Pittsburgh Mining Co., 15 O.S.C., N.S. 286; Joslin-Schmidt Co. vs. Herrmann, 26 O.C.C., N.S. 348; Ward vs. Ward, 20 O.C.C. 136; 18 C.J. 622 et seq.; In re John H. Quick, 1 N.P., N.S. 57; National Cash Register Co. vs. Heyne, 10 N.P., N.S. 564; 4 Ohio Juris. 81, §54; Annotation, 74 A. L.R. 471. Compare: Tumey vs. Ohio, 273 U.S. 510, and Doherty vs. Cremering, (C.C.A. 6) 83 F. (2d) 388.

The affidavits filed in the state court, in my opinion, could not be amended by the supplemental affidavit filed in this court. Leavitt vs. Rosenberg, 83 O.S. 230, 240, 241. In Ohio the syllabus is the law of the case, and the fourth syllabus of the above case is as follows:

"The levy of the order of attachment, based upon an insufficient affidavit, cannot be upheld by an amendment of the affidavit."

The General Code, Section 11820, as amended (1935, 116 Ohio Laws, 370), can have no bearing in this case. See General Code of Ohio, Section 26. While Sections 11462, 11293, 11524, 11820, 11869 and 12052 have been amended so as to permit the taking of an affidavit by an attorney in the case, there seems to have been no amendment as to the garnishment statute, Section 11828 of the General Code of Ohio (116 Ohio Laws, 369-371).

If the affidavits filed in the Court of Common Pleas were defective because they were not sworn to before the proper officer, then the decision of Judge Westernhaver in *Cleveland & Western Coal Co. vs. J. H. Hillman & Sons*, 245 Fed. 200, applies. As a result of that application, it

*Journal Entry*

follows that the attempted attachment and garnishment in this court, based upon the supplemental and amended petition and the supplemental affidavit, is also void and of no effect because no personal service has been obtained upon the defendant. See *Big Vein Coal Co. vs. Read*, 229 U. S. 31. Compare *Clark vs. Wells*, 203 U. S. 164.

The case, therefore, stands in this court without service of any kind upon the defendant. If the plaintiff so desires, the action may remain pending for the purpose of procuring proper service. If the plaintiff does not desire that the action remain pending for that purpose, following the practice in *Cleveland & Western Coal Co. vs. J. H. Hillman & Sons*, supra, an order may be entered discharging the attachment and garnishment and striking plaintiff's petition from the files of this court. An exception may be noted on behalf of the plaintiff.

Geo. P. Hahn, District Judge.  
Toledo, Ohio, June 24, 1936.

**JOURNAL ENTRY**  
(Filed July 11, 1936.)

This 11th day of July, 1936, this cause came on to be heard on the motions of defendants, Devon Syndicate, Limited, to quash the pretended service of summons on said defendant, to set aside the return thereof and to dismiss the attempted attachment and garnishment, and was considered by the court on the evidence offered by said defendant in support of said motions, and the arguments and briefs of counsel; and the court being fully advised in the premises and upon consideration thereof finds that defendant, Devon Syndicate, Limited, has entered in this court a special appearance solely for the purpose of filing and presenting its motions above described; that defendant, Paris E. Singer, without entering his appearance herein, except a special appearance for the sole purpose of filing and presenting to the court a motion similar to the first of the motions of Devon Syndicate, Limited, herein described, had died pending this action and that plaintiff had announced that the action hereafter would proceed against defendant, Devon Syndicate, Limited, alone.

The court further finds that the notary, to wit, D. W. Drennan, before whom the affidavits in attachment and garnishment dated June 19th and June 27, 1930, respectively, and each of them, were sworn, was not a proper person to act as notary on such affidavits, or either of them, and that such affidavits, and each of them, were void and of no effect.

The court further finds that the attempt by plaintiff to amend the proceedings in attachment and garnishment originally had in the Court of Common Pleas of Lucas County, Ohio, after removal to this court by filing the supplemental affidavit in attachment and garnishment on February 17, 1936, was void and ineffective for the reason that no personal service had been obtained upon the defendant, Devon Syndicate, Limited, nor the defendant, Paris E. Singer.

The court further finds that it is unnecessary for it to pass upon the other grounds urged by Devon Syndicate, Limited, for the granting of its motions.

It is therefore ordered that the motions of defendant, Devon Syndicate, Limited, filed herein on the 26th day of January, 1931, and on the 11th day of April, 1936, respectively, and each of them, be and they are hereby granted to the extent that the attempted service of summons on defendant, Devon Syndicate, Limited, objected to by said motions, and each of them, be and it is hereby quashed and held for naught, and all returns of such service by the Sheriff of Lucas County, Ohio, and the Marshal of this court, be and each of them are hereby set aside.

It is further ordered that any and all of the publications of service of summons heretofore had herein, and any and all proofs thereof heretofore filed, be and they are hereby quashed and held for naught.

And the court being advised by plaintiff's counsel that the plaintiff desires no further time or opportunity to attempt to obtain personal service of process herein on the defendant, Devon Syndicate, Limited, it is further ordered that the attachment and garnishment herein be discharged, and the plaintiff's petition and amended supplemental petition be stricken from the files of this court at plaintiff's costs.

Plaintiff excepts to each and every provision of the foregoing findings and order.

Geo. P. Hahn  
U. S. District Judge.

OK.—Fraser, Effler, Shumaker & Winn.  
July 11, 1936.



*Order***ORDER**

(Filed Aug. 22, 1936.)

It is ordered that the plaintiff, Horton C. Rorick, be and he is hereby granted an extension of time in which to file his bill of exceptions herein, so that said bill of exceptions may be filed by said plaintiff on or before the 30th day of September, 1936.

Geo. P. Hahn,  
U. S. District Judge.

**ORDER**

(Filed Sep. 29, 1936.)

Upon application of the plaintiff-appellant, the time within which the said plaintiff-appellant shall lodge his narrative form of testimony with the Clerk, and within which his said Bill of Exceptions shall be settled and filed herein, is extended to and including October 28, 1936, and the time to complete his record and file the same in the United States Circuit Court of Appeals, pursuant to the appeal sued out, is extended to and including October 28, 1936.

Geo. P. Hahn,  
United States District Judge.



*Petition for Appeal***PETITION FOR APPEAL**

(Filed Sep. 29, 1936.)

To the Hon. Geo. P. Hahn, District Judge:

Now comes Horton C. Rorick by his attorneys, and respectfully shows that on the 11th day of July, 1936, the court entered a final judgment herein against your petitioner-plaintiff and in favor of the defendant.


The said cause is one wherein your petitioner-plaintiff sought, by means of the provisional remedies of attachment and garnishment, to subject property of the defendant to the satisfaction of his claims against the defendant; and the case is one in which under the legislation in force when the Act of January 31, 1928, was passed, a review could be had on writ of error.

Your petitioner feeling himself aggrieved by the said judgment aforesaid herewith petitions the court for an order allowing him to appeal to the Circuit Court of Appeals of the United States for the Sixth Circuit under the laws of the United States in such cases made and provided, for the reasons specified in the assignment of errors filed herewith.

Wherefore your petitioner prays that his appeal may be allowed, that a citation be issued as provided by law, and that a duly authenticated transcript of the record, proceedings, papers and exhibits upon which said judgment was entered and which are necessary to said appeal, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit under the rules of such court in such cases made and provided, and that an order be made fixing the amount of security to be given by petitioner conditioned as the law directs.

Fraser, Effler, Shumaker & Winn,  
Attorneys for Petitioner.

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**ASSIGNMENT OF ERRORS**

(Filed Sep. 29, 1936.)

Now comes Horton C. Rorick, plaintiff in the above entitled action, and in connection with his petition for appeal, files the following assignment of errors upon which he will rely in the prosecution of the appeal herewith petitioned for in said cause from the judgment of this court entered on the 11th day of July, 1936:

1. The court erred in granting the motion of the defendant Devon Syndicate, Limited, filed on the 26th day of January, 1930, for an order quashing service of summons on the defendant, and setting aside the return thereof, and dismissing the attachment and garnishment of defendant's property, and in failing to overrule said motion.

2. The court erred in granting the motion of defendant, Devon Syndicate, Limited, filed April 11, 1936, for an order quashing the pretended service of summons on plaintiff's supplemental and amended petition, and setting aside the return thereof, and dismissing the attachment and garnishment of defendant's property made on the supplemental affidavit and garnishment, and in failing to overrule said motion.

3. The court erred in setting aside, quashing and holding for naught all publications of service of summons on the defendant Devon Syndicate, Limited.

4. The court erred in discharging the attachment and garnishment of defendant's property secured by the plaintiff in the Court of Common Pleas of Lucas County, Ohio, prior to the removal of the cause herein to this court.

5. The court erred in dismissing and discharging the attachment and garnishment of defendant's property secured by the plaintiff pursuant to proceedings had herein and secured pursuant to plaintiff's affidavit in garnishment and his supplemental and amended petition.

6. The court erred in finding that the notary, to wit, D. W. Drennan, before whom the affidavits in attachment and garnishment dated June 19th and June 27th, 1930, respectively and each of them, were sworn, was not a proper person to act as notary on such affidavits, or either of them, and that such affidavits, and each of them, were void and of no effect.

7. The court erred in finding that the attempt by plaintiff to amend the proceedings in attachment and garnishment originally had in the Court of Common Pleas

*Assignment of Errors*

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of Lucas County, Ohio, after removal to this court by filing the supplemental affidavit in attachment and garnishment on February 17, 1936, was void and ineffective.

8. The court erred in striking plaintiff's petition and his amended and supplemental petition from the files.

9. The court erred in failing and refusing to sustain the said attachments and garnishments secured by plaintiff of the property of the defendant, pursuant to the proceedings had in the Court of Common Pleas of Lucas County, Ohio, and thereafter, upon the removal of this cause, in this court, and in failing and refusing to permit the plaintiff herein to proceed to a trial by jury on the merits of the claims set forth in his supplemental and amended petition.

Wherefore, plaintiff prays that judgment heretofore entered herein on the 11th day of July, 1936, may be reversed, and that this cause may be remanded for further proceedings not inconsistent with law.

Fraser, Effler, Shumaker & Winn,  
Attorneys for Plaintiff-Appellant.

H. W. Fraser  
George R. Effler  
R. B. Swartzbaugh  
Of Counsel.

*Order Allowing Appeal***ORDER ALLOWING APPEAL**

(Filed Sep. 29, 1936.)

This cause came on to be heard upon the 29th day of September, 1936, upon the petition for appeal of the plaintiff, filed herein on the 29th day of September, 1936, praying for the allowance of an appeal from the judgment of this court entered on the 11th day of June, 1936, and upon consideration thereof, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Sixth Circuit, from the judgment heretofore entered herein, on the 11th day of July, 1936, be, and the same hereby is allowed, and that a transcript of the record, proceedings, papers and exhibits in this cause necessary to said appeal shall be duly authenticated and sent to the United States Circuit Court of Appeals for the Sixth Circuit.

It is further ordered that the bond on this appeal be, and is, fixed at Three Hundred (\$300.00) Dollars to secure the costs on appeal.

Geo. P. Hahn,  
United States District Judge.

*Appeal Bond***APPEAL BOND**  
(Filed Sept. 29, 1936)

Know All Men by These Presents, that Horton C. Rorick as principal, and the United States Fidelity & Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the defendant Devon Syndicate, Limited, a Canadian corporation, in the above entitled cause, in the full and just sum of Three Hundred (\$300.00) Dollars, to be paid to Devon Syndicate, Limited, its successors and assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Whereas, on the 11th day of July, 1936, a judgment against the plaintiff and in favor of said defendant was entered in the above entitled cause, and the plaintiff, Horton C. Rorick, has obtained an order allowing an appeal from said judgment to the United States Circuit Court of Appeals for the Sixth Circuit.

Now, the condition of this obligation is such that if Horton C. Rorick shall prosecute said appeal to effect, and shall answer all costs that may be awarded against him if he shall fail to make good his plea on said appeal, then this obligation shall be void; otherwise to remain in full force and effect.

Horton C. Rorick,  
United States Fidelity & Guaranty Company,  
By Leo E. Regall. (Seal)

Approved:

Geo. P. Hahn,  
United States District Judge.



*Citation on Appeal***CITATION ON APPEAL**

(Filed Oct. 1, 1936)

To Devon Syndicate, Limited, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the 28th day of October next, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Northern District of Ohio, wherein Horton C. Rorick is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as mentioned in said petition for appeal, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George P. Hahn, judge of the United States District Court at Toledo, Ohio, within said circuit, this 29th day of September, in the year of our Lord One Thousand Nine Hundred Thirty-six, and the Independence of the United States One Hundred Sixty:

Geo. P. Hahn,  
United States District Judge.

Service of the above citation is hereby acknowledged, and the appearance of appellee is hereby entered.

Dated September ..., 1936.

.....  
.....  
Attorneys for Defendant-Appellee.

*Affidavit of Service of Citation on Appeal***AFFIDAVIT OF SERVICE OF CITATION ON  
APPEAL**

(Filed Oct. 1, 1936)

State of Ohio, County of Lucas, ss.

R. B. Swartzbaugh, being first duly sworn, says that he is one of the duly authorized attorneys for Horton C. Rorick, plaintiff-appellant herein; that pursuant to the order of the court heretofore entered herein allowing plaintiff-appellant's appeal, a citation on appeal was issued by said court, a copy of which is attached hereto.

Affiant further says that he served said citation on appeal on Fred A. Smith, associated with the law firm of Welles, Kelsey & Cobourn, and one of the duly authorized attorneys for the defendant-appellee herein, at the office of Welles, Kelsey & Cobourn, on the 29th day of September, 1936, at about 2:00 o'clock P.M., by submitting said citation on appeal to said attorney for acknowledgment of service, together with a copy thereof; that said attorney refused to acknowledge said service, but received and retained a copy of said citation.

R. B. Swartzbaugh.

Sworn to before me and subscribed in my presence  
this 30th day of September, 1936.

(Seal) Caroline McLaughlin,  
Notary Public, Lucas County, Ohio.

*Citation on Appeal***CITATION ON APPEAL**

To Devon Syndicate, Limited, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit, on the 28th day of October next, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Northern District of Ohio, wherein Horton C. Rorick is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as mentioned in said petition for appeal, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George P. Hahn, judge of the United States District Court at Toledo, Ohio, within said circuit, this 29th day of September, in the year of our Lord One Thousand Nine Hundred Thirty-six, and the Independence of the United States One Hundred Sixty.

.....  
United States District Judge.

Service of the above citation is hereby acknowledged, and the appearance of appellee is hereby entered.

Dated September ..., 1936.

.....  
Attorneys for Defendant-Appellee.

**PLAINTIFF'S NARRATIVE BILL OF EXCEPTIONS**

(Filed Oct. 6, 1936)

Be It Remembered, that the foregoing mentioned cause was heard before Honorable George P. Hahn, judge, on June 8th, 1936, and the following testimony was taken, to-wit:

Appearances: For the plaintiff, Harold W. Fraser, Esq.; George R. Effler, Esq., and Richard B. Swartzbaugh, Esq. For the defendant, Sidney D. L. Jackson, Esq., and Fred A. Smith, Esq., of Messrs. Welles, Kelsey & Cobourn.

The defendant called as a witness

**DENNIS W. DRENNAN,**

who, being duly sworn, testified as follows:

**DIRECT EXAMINATION**

By Mr. Jackson:

My name is Dennis W. Drennan. I live at 3817 Willys Parkway, Toledo. I am a lawyer, employed by Spitzer Rorick & Company, incorporated now; it is an outgrowth of Spitzer Rorick & Company, a partnership. Prior to being employed by the corporation, I was employed by Spitzer Rorick & Company, the partnership. I had been employed by that partnership since January 25, 1916, and was continuously employed by the partnership up until the date of incorporation, since which time I have been employed by the corporation.

I was admitted to the bar just a few days prior to going to work for the Spitzer Rorick Company; I think it was January 6, 1916. I am a member of the bar of this court.

Mr. Horton C. Rorick was a member of the partnership of Spitzer Rorick & Company, and is an officer of the corporation. He holds the office of president. During the time that I was employed by Spitzer Rorick & Company, the partnership, it was doing a very active municipal bond business, and my work was that of handling transcripts relating to bond issues and I made preliminary examination of them myself and then passed them on to a better attorney, who had a reputation in that kind of work, for his approving opinion. That was Mr. Denison, of Squire, Sanders & Dempsey, and Mr. Harrison, who formerly practiced here. And then any requests by these attorneys for examination of the abstract was obtained by me and resubmitted to them.

I don't know anything about this case, but I knew such a case was pending. I have never discussed the case with Mr. Rorick. I am a notary public. I don't remember ever having any conversation with Mr. Rorick relative to the case. I knew that such a case was pending from things that have been said in the office, but he has never consulted me on the case. I have no distinct recollection of acting as notary public on certain affidavits that were filed in this case; if my name is on, I assume I did.

Mr. Jackson:

You will concede Mr. Drennan is the notary who notarized the affidavits of June 19, 1930, and June 25, 1930?

Mr. Fraser:

If those are the dates, we will.

The Witness:

I haven't any distinct recollection of subsequently acting as notary on certain answers of garnishees that were filed in this court on January 15th and 16th, 1931. That is my signature on the answer of Spitzer Rorick Trust & Savings Bank, garnishee, as notary. That is my signature on the answer of the Everglades Club Company, garnishee, filed in this court January 16, 1931, on page 5, as notary. That is my signature as notary on the answers of the garnishees Albert C. Foster, Horton C. Rorick, and Paris E. Singer, as voting trustees. I could not say as to whether those three answers were prepared in my office or the office of Spitzer Rorick & Company, except that I did not prepare them. I did not have anything to do with it, except as notary. I don't know whether they were prepared in the office of Spitzer Rorick & Company. I did not examine the typing and I don't imagine I could tell from that; I couldn't say.

Mr. Jackson:

If the court please, we have subpoenaed from the clerk's office of the Court of Common Pleas their file of papers in this particular case. Might I ask counsel if they will require me to call a witness to identify the file?

Mr. Fraser:

No.

Mr. Jackson:

There is a certified copy on file in this court, sent over at the time the action was removed but these are the original documents actually filed in the Court of Common Pleas.

The Court:

Do you claim there is any discrepancy between the copies and the originals?

Mr. Jackson:

No, the copies are accurate, if the court please. I merely got these to show the source of preparation. I direct your attention, Mr. Drennan, to the affidavit in attachment and garnishment filed in the Court of Common Pleas June 27, 1930. Is this your signature on that second page of that document, as notary?

The Witness:

That is my signature as notary. I would say it was not prepared by me. That is as far as I can go with it. I don't think there is anything there that I am able to recognize as coming from our office. It may have been prepared there; I am not an expert on typewriting.

Mr. Jackson:

It is stipulated that the original petition filed in the Court of Common Pleas on June 19, 1930, was prepared in the office of Fraser, Hiatt, Wall & Effler, and appears it was dictated by Mr. Harold W. Fraser; that the affidavit in attachment and garnishment filed in the Court of Common Pleas on June 19, 1930, was prepared in the office of Fraser, Hiatt, Wall & Effler, and was dictated by Mr. Ross W. Shumaker; that the affidavit in attachment and garnishment filed June 27th, 1930, in the Court of Common Pleas was prepared in the office of Mr. Horton C. Rorick, all except the præcipe, which is of a strange typing.

The Witness:

I don't remember of having anything to do with the affidavit in attachment and garnishment filed June 27, 1930; in fact, I don't remember of even signing my name, but it is my signature, nevertheless, as notary public, not as attorney. I really have no independent recollection on the matter.



I have, to some extent, as a part of my duties, occasionally investigated matters or appeared in court or investigated matters in the clerk's office for Spitzer Rorick & Company, perhaps in the last two years. I don't remember of ever appearing prior to that time. I believe I was at one time identified in a case for them in the Court of Common Pleas prior to two years ago. In fact, I don't know that I have represented them in a case in court even in the last two years, but I did some time ago.

I handle some private practice on my own, in addition to my work with Spitzer Rorick & Company and Mr. Rorick; all that comes to me, as a matter of fact. I do some work for the Spitzer Rorick Trust & Savings Bank. I think I represented the two Rorick boys one time in a justice court case, where they were charged with having driven a car with one headlight, or something like that. That is the only one I remember. My principal occupation is in the office of Spitzer Rorick, Inc., or Spitzer Rorick & Company, its predecessor, and I do what ever work comes up.

Mr. Fraser:

It may be conceded that upon no paper appearing here does Mr. Drennan appear as attorney of record?

Mr. Jackson:

It may be conceded.

### CROSS EXAMINATION

By Mr. Fraser:

I never have been employed by Mr. Horton C. Rorick as his personal counsel in any case. I have not been consulted as attorney by Mr. Rorick or anyone else. I have no interest in this case in any way; shape or form, financially or otherwise, and I have not had before its inception, filing, or since at any time. I am not related to Mr. Rorick. My only connection with the case is the fact that on a few papers I acted as notary public.

Thereupon, counsel presented their arguments to the court.

*Order***ORDER**

(Filed Oct. 15, 1936)

This day this cause came on to be heard upon the application of the plaintiff-appellant for an order approving and settling the narrative bill of exceptions lodged and filed with the clerk of this court on October 6th, 1936, and the court finds the same to be a true, complete and properly prepared statement of all the evidence taken and given and of the proceedings had in this cause necessary for a review of the rulings assigned as error on the appeal herein, and that the same was lodged with and delivered to said clerk by the plaintiff-appellant within the time allowed therefor by order of this court, dated September 29, 1936, extending the time for settling and filing said narrative bill of exceptions herein to and including October 28, 1936.

Wherefore, it is ordered, adjudged and decreed that said narrative bill of exceptions be and it is allowed and approved as the statement of the evidence to be included in the record on appeal in this cause, and it is ordered to be included in the record on appeal herein.

Geo. P. Hahn,

United States District Judge.

Approved:

Fraser, Effler, Shumaker & Winn,  
Counsel for Plaintiff-Appellant......  
Counsel for Defendants-Appellees.

*Order***ORDER**

(Filed Oct. 28, 1936)

Upon the application of the plaintiff-appellant, the time for the plaintiff-appellant to complete and file his record, and for the making of the clerk's return to the citation on plaintiff-appellant's appeal in this case in the United States Circuit Court of Appeals, pursuant to the appeal sued out herein, is extended to and shall include January 28, 1937.

Geo. P. Hahn,  
United States District Judge.

**AFFIDAVIT OF PARIS E. SINGER IN SUPPORT OF  
MOTION OF DEVON SYNDICATE, LIMITED**  
(Filed May 1, 1931)

Consulate of the United States of America,  
Cairo, Egypt, ss.

Paris E. Singer, being first duly sworn deposes and says: That he is one of the defendants named in the above entitled proceeding; that at the time said proceeding was commenced and at all times thereafter, deponent was and now is president of Devon Syndicate, Limited, the other defendant in the above entitled proceeding (whose name was erroneously stated in Plaintiff's petition to be Devon Syndicate, Ltd.); that on or about the 22nd day of March, 1928, Everglades Club Company, a corporation of the State of Florida, one of the garnishees in said proceeding, made and executed five (5) promissory notes each in the sum of fifty thousand dollars (\$50,000), numbered 1 to 5, respectively, payable to the order of said Devon Syndicate, Limited, and having maturities as follows: Note No. 1, on or before March 30th, 1929; Note No. 2, on or before March 30, 1930; Note No.

*Affidavit of Paris E. Singer*

3, on or before March 30th, 1931; Note No. 4, on or before March 30th, 1932; Note No. 5, on or before March 30th, 1933; that true copies of said notes, together with the endorsements on the back thereof, are attached hereto in Exhibit E and made a part hereof; that on or about the first day of February, 1928, said Devon Syndicate, Limited, was the owner of one thousand (1,000) shares without par value of said Everglades Club Company, being all of the capital stock of said corporation; that on or about said date said Devon Syndicate, Limited, assigned and transferred said stock to Albert V. Foster, Horton C. Rorick (being the same Horton C. Rorick who is the plaintiff in the above entitled action), and Paris E. Singer (who is the deponent hereof) as trustees under a certain Voting Trust Agreement bearing date on or about February 1, 1928, pursuant to which agreement said stock was and is held by said trustees for the purposes and for the term therein set forth; that a true copy of said Voting Trust Agreement, marked Exhibit A, is attached to an affidavit of deponent heretofore or simultaneously herewith filed herein in support of the motion of Devon Syndicate, Limited, to quash service and vacate the pretended levies of attachment or garnishment herein, that reference is made to said Exhibit A and all the contents thereof and the same is made a part hereof; that pursuant to the terms of said Voting Trust Agreement the Voting Trustees agreed to issue upon the deposit of said 1,000 shares of Everglades Club Company, Voting Trust Certificates representing 500 shares of the stock of said Everglades Club Company to said Devon Syndicate, Limited, and Voting Trust Certificates representing 500 shares of stock in said company to Spitzer-Rorick & Company, a co-partnership engaged in the marketing and selling of investment securities, doing business and having an office in the City of Toledo, Ohio; that said Horton C. Rorick is one of the partners in said firm; that pursuant to the terms of said agreement, Voting Trust Certificates in the amounts stated were executed and delivered by said Voting Trustees to Devon Syndicate, Limited, and to Spitzer-Rorick & Company, such certificates being substantially in the form set forth in said Voting Trust Agreement.

That the reason for the issue of said Certificates to Spitzer-Rorick & Company was as follows: on or about February 1, 1928, said Spitzer-Rorick & Company entered into a written agreement with Everglades Club Company by which Spitzer-Rorick & Company agreed to underwrite

*Affidavit of Paris E. Singer*

and sell \$1,500,000 par value of bonds bearing  $6\frac{1}{2}\%$  interest, executed by said Everglades Club Company and secured by a first mortgage lien upon property of said Everglades Club Company located in the City of Palm Beach, Florida; that said Devon Syndicate, Limited, as an inducement to said Spitzer-Rorick & Company to enter into said contract to sell said bonds, and as an additional consideration in the premises, agreed to assign and transfer or to cause to be assigned and transferred to said Spitzer-Rorick & Company Voting Trust Certificates issued or to be issued pursuant to said Voting Trust Agreement of February 1, 1928, representing five hundred (500) shares or one-half ( $\frac{1}{2}$ ) of the total authorized capital stock of said Everglades Club Company, upon the further understanding and agreement, however, that said Devon Syndicate, Limited, should have the power, right and option to repurchase said Voting Trust Certificates at any time prior to February 1, 1933, the price to be in the event of the exercise of the option, prior to February 1, 1930, ten thousand dollars (\$10,000), the price in the event of the exercise of such option from February 1, 1930, to February 1, 1931, fifteen thousand dollars (\$15,000), from February 1, 1931, to February 1, 1932, twenty thousand dollars (\$20,000), from February 1, 1932, to February 1, 1933, twenty-five thousand dollars (\$25,000); that said option agreement is evidenced by a letter dated February 1, 1928, signed by said Spitzer-Rorick & Company, a true copy of which is attached hereto marked Exhibit F, and made a part hereof; that said Devon Syndicate, Limited, heretofore and on the 31st day of March, 1923, issued for a valuable consideration, \$4,930,000 par value of debentures maturing April 1, 1953, and bearing interest at the rate of 8% per annum, payable quarterly on the first days of April, July, October and January in each year; that up to and including the first day of October, 1928, no interest was paid to the holders of said debentures as required by the terms thereof; that on the first day of October, 1928, one Cecil Mortimer Singer, a citizen and subject of Great Britain, then residing at Occombe House, Marldon, Paignton, in the County of Devon, England, was the registered holder and owner of sixty (60) of said debentures in the principal sum of ten thousand dollars (\$10,000) each, and as such was entitled to receive all the accrued and unpaid interest thereon; that on October 1, 1928, one Paris Graham Singer, a citizen and subject of Great Britain, then residing at 51 Gloucester Terrace, Hyde Park, in the County of London,



*Affidavit of Paris E. Singer*

England, was the registered holder and owner of sixty (60) of said debentures in the principal sum of ten thousand dollars (\$10,000) each, and as such was entitled to receive all the accrued and unpaid interest thereon; that on or about December 11, 1928, in consideration of the release by said Cecil Mortimer Singer and by said Paris Graham Singer, of all claims for unpaid interest upon said debentures, to and including the interest which had become payable thereon on the first day of October, 1928, and in consideration of other good and valuable consideration Devon Syndicate, Limited, by instrument of assignment dated December 11, 1928, assigned to said Cecil Mortimer Singer and said Paris Graham Singer, all of its right, title and interest in and to said five notes for fifty thousand dollars (\$50,000) each, executed by Everglades Club Company, true copies of which are set forth in Exhibit E hereunto attached, a true copy of which assignment is attached hereto and marked Exhibit G, and also assigned for said considerations, all of its right, title and interest in and to said option agreement of February 1, 1928 (a true copy of which is attached hereto and marked Exhibit F), which last mentioned assignment is by written instrument dated also December 11, 1928, a true copy of which is attached hereto and marked Exhibit H; that by reason of said assignments all right, title and interest of Devon Syndicate, Limited, in and to said five promissory notes for fifty thousand dollars (\$50,000) each (Exhibit E), and in and to said Option Agreement (Exhibit F) was transferred to and became vested in said Cecil Mortimer Singer and said Paris Graham Singer; that in addition to said assignment of December 11, 1928, by which title in said notes was transferred to said assignees, each of said notes Nos. 1, 3, 4 and 5 were endorsed and made payable by endorsement to the order of said Cecil Mortimer Singer and said Paris Graham Singer, the names of the endorsees, however, being stated in said endorsements as Cecil M. Singer and P. G. Singer; that a true copy of said endorsements is set forth in Exhibit E hereunto annexed and made a part hereof; that said Note No. 2 is endorsed by said Devon Syndicate, Limited, and made payable to the order of said Paris Graham Singer, his name being designated as P. G. Singer as shown and set forth in a true copy of the endorsement contained in Exhibit E hereunto annexed; that the endorsement on said Note No. 2 to said Paris Graham Singer instead of to Paris Graham Singer and Cecil Mortimer Singer, the two assignees, was made at the request of and with the consent of both assignees in



*Affidavit of Paris E. Singer*

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order to expedite the presentation thereof to the maker for payment; that said note No. 1 for fifty thousand dollars (\$50,000) became due and payable on or before March 30, 1929; that said note was sent by said Cecil Mortimer Singer and said Paris Graham Singer to the New York agency of the Bank of Montreal for collection, and on information and belief that said note was presented for payment on the 30th day of March, 1929, to said Everglades Club Company, which payment was refused as shown by the protest of L. C. Kolb, Notary Public of the State of Florida, a true copy of which protest is hereunto annexed and marked Exhibit J; that said Note No. 1 bears an endorsement on the back thereof of said Cecil M. Singer and said P. G. Singer, the original endorsees by which said note was made payable to the order of Agents Bank of Montreal at New York, a true copy of the form of such endorsement being set forth in Exhibit E attached hereto and made a part hereof; that said Note No. 1 also bears an endorsement by said L. C. Kolb, recording the protest for non-payment, a true copy of which endorsement is set forth in Exhibit E hereunto annexed and made a part hereof; that upon information and belief said Note No. 2 for fifty thousand dollars (\$50,000) made payable on or before March 30th, 1930, and endorsed by Devon Syndicate, Limited, to the order of P. G. Singer as hereinbefore set forth, was presented by said Paris Graham Singer in person to said Everglades Club Company with demand for payment, which payment was refused.

P. G. Singer.

Subscribed and sworn to before me this 16th day of January, 1931.

(Seal)

Easton T. Kelsey,  
American Vice Consul.

Stamped: American Foreign Service, \$2.00 Fee Stamp.

*Affidavit of Paris E. Singer***EXHIBIT E**

No. 1      \$50,000.00

Palm Beach, Florida, March 22, 1928

On or before March 30, 1929, for value received, we promise to pay to the order of Devon Syndicate, Ltd., Fifty thousand and 00/100.....Dollars at Palm Beach, Florida, with interest thereon at the rate of      per cent. per annum from      until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of nonpayment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred interest payments to bear interest from maturity at      per cent. per annum, payable semi-annually.

Everglades Club Company,

By P. E. Singer, President (Seal)

A. W. MacDougall, Secretary. (Seal)

Due....., 19....

(Endorsements)

Pay to the order of Cecil M. Singer and P. G. Singer  
Devon Syndicate, Ltd.

(Signed) P. E. Singer, President.

J. Bransbury, Secretary.

Pay to the order of Agents Bank of Montreal  
New York

(Signed) Cecil M. Singer,

P. G. Singer

(Stamp)

Palm Beach, Fla., Mar. 30, 1929

Protested for Non-Payment

L. C. Kolb

Notary Public State of Florida at Large

My Commission expires Dec. 24, 1929.

No. 2      \$50,000.00

Palm Beach, Florida, March 22, 1928

On or before March 30, 1930, for value received, we promise to pay to the order of Devon Syndicate, Ltd., Fifty thousand and 00/100.....Dollars at Palm Beach, Florida, with interest thereon at the rate of      per cent. per annum from      until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall

*Affidavit of Paris E. Singer*

be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred interest payments to bear interest from maturity at per cent. per annum, payable semi-annually.

Everglades Club Company,

By P. E. Singer, President (Seal)

A. W. MacDougall, Secretary. (Seal)

Due....., 19....

(Endorsement)

Pay to the order of P. G. Singer

(Signed) P. E. Singer, President,  
Devon Syndicate, Ltd.

No. 3 \$50,000.00

Palm Beach, Florida, March 22, 1928

On or before March 30, 1931, for value received we promise to pay to the order of Devon Syndicate, Ltd., Fifty thousand and 00/100.....Dollars, at Palm Beach, Florida, with interest thereon at the rate of per cent. per annum from until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred interest payments to bear interest from maturity at per cent. per annum, payable semi-annually.

Everglades Club Company,

By P. E. Singer, President. (Seal)

A. W. MacDougall, Secretary. (Seal)

Due....., 19....

(Endorsement)

Pay to the order of Cecil M. Singer and P. G. Singer  
Devon Syndicate, Ltd.

(Signed) P. E. Singer, President.

No. 4 \$50,000.00

Palm Beach, Florida, March 22, 1928.

On or before March 30, 1932, for value received, we promise to pay to the order of Devon Syndicate, Ltd., Fifty thousand and 00/100.....Dollars at Palm Beach, Florida, with interest thereon at the rate of per cent. per annum from until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall

*Affidavit of Paris E. Singer*

be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred interest payments to bear interest from maturity at per cent. per annum, payable semi-annually.

Everglades Club Company,  
By P. E. Singer, President. (Seal)  
A. W. MacDougall, Secretary. (Seal)

This note is subject to extension from time to time until paid if the finances of your company so require.

Due....., 19....

(Endorsement)

Pay to the order of Cecil M. Singer and P. G. Singer.  
Devon Syndicate, Ltd.

(Signed) P. E. Singer, President.

No. 5      \$50,000.00

Palm Beach, Florida, March 22, 1928.

On or before March 30, 1933, for value received, we promise to pay to the order of Devon Syndicate, Ltd., Fifty thousand and 00/100.....Dollars at Palm Beach, Florida, with interest thereon at the rate of per cent. per annum from until fully paid. Interest payable semi-annually. The maker and endorser of this note further agree to waive demand, notice of non-payment and protest; and in case suit shall be brought for the collection hereof, or the same has to be collected upon demand of an attorney, to pay reasonable attorney's fees for making such collection. Deferred interest payments to bear interest from maturity at per cent. per annum, payable semi-annually.

Everglades Club Company,  
By P. E. Singer, President. (Seal)  
A. W. MacDougall, Secretary. (Seal)

This note is subject to extension from time to time until paid if the finances of your company so require.

Due....., 19....

(Endorsement)

Pay to the order of Cecil M. Singer and P. G. Singer,  
Devon Syndicate, Ltd.

(Signed) P. E. Singer, President.

EXHIBIT F

Toledo, Ohio, Feby. 1st, 1928.

Devon Syndicate, Ltd.,  
Montreal, Canada.

Attention—Paris E. Singer, President.

Dear Sirs,

Referring to our agreement of even date herewith under which you assign and transfer to us Voting Trust Certificates representing five hundred (500) Shares or one half ( $\frac{1}{2}$ ) of total authorized capital stock of the Everglades Club Company

We hereby confirm our agreement that as part consideration of the said assignment and transfer, we agree to give you the sole and exclusive right to repurchase said Voting Trust Certificates at any time prior to February 1st, 1933. The price to be paid us by you in case of your exercising your said option at any time prior to February 1st, 1930, is \$10,000; the price to be paid us at any time from February 1st, 1930, to February 1st, 1931, is \$15,000; the price to be paid us from February 1st, 1931, to February 1st, 1932, is \$20,000; the price to be paid us from February 1st, 1932, up to February 1st, 1933, is \$25,000.

The foregoing is in favor of yourself, your successors, assigns and transferees.

Yours very truly,

H.C.R. W.S.D.

(Sgd) Spitzer-Rorick & Co.

For & on behalf of  
Devon Syndicate Ltd.  
P. E. Singer, President

EXHIBIT G

This Assignment made this eleventh day of December, 1928 Between Devon Syndicate Limited a Company incorporated under the Laws of the Dominion of Canada having its office at 120 St. James Street, Montreal in the Dominion of Canada (hereinafter called "the Company") of the one part and Cecil Mortimer Singer of Occombe House Marldon Paignton in the County of Devon England and Paris Graham Singer of 51 Gloucester Terrace Hyde Park in the County of London England (hereinafter collectively referred to as "the Debenture Holders") of the other part Whereas the said Cecil Mortimer Singer is the registered holder of Sixty

Debentures for Ten thousand dollars each issued by the Company all dated the 31st day of March 1923 and Numbered A 121 to A 180 inclusive bearing interest at the rate of Eight per cent. per annum payable quarterly on the first days of April July October and January in each year and upon which said Debentures there is a considerable sum of money now due and outstanding and unpaid by the Company to the said Cecil Mortimer Singer for interest thereon down to and including the interest on the said Debentures which became payable on the 1st day of October last as the Company hereby admits and declares And Whereas the said Paris Graham Singer is the registered holder of Sixty Debentures for Ten thousand dollars each issued by the Company all dated the 31st day of March 1923 and Numbered A 181 to A 240 inclusive bearing interest at the rate of Eight per cent. per annum payable quarterly as aforesaid and upon which said Debentures there is a considerable sum of money now due and outstanding and unpaid by the Company to the said Paris Graham Singer for interest thereon down to and including the interest on the said Debentures which became payable on the 1st day of October last as the Company hereby admits and declares And Whereas Everglades Club Company a Company incorporated under the Law of the State of Florida U. S. A. is indebted to the Company in

(a) the sum of Fifty thousand (\$50,000) Dollars secured by a note therefor dated the 22nd day of March 1928 given by the said Everglades Club Company to the Company and payable according to the tenor thereof on or before the 30th day of March 1929

(b) the sum of Fifty thousand (\$50,000) dollars secured by a note therefor dated the 22nd day of March 1928 given by the said Everglades Club Company to the Company and payable according to the tenor thereof on or before the 30th day of March 1930

(c) the sum of Fifty thousand (\$50,000) dollars secured by a note therefor dated the 22nd day of March 1928 given by the said Everglades Club Company to the Company and payable according to the tenor thereof on or before the 30th day of March 1931

(d) the sum of Fifty thousand (\$50,000) dollars secured by a note therefor dated the 22nd day of March 1928 given by the said Everglades Club Company to the Company and payable according to the tenor thereof on or before the 30th day of March 1932, and



*Affidavit of Paris E. Singer*

(e) the sum of Fifty thousand (\$50,000) Dollars secured by a note therefor dated the 22nd day of March 1928 given by the said Everglades Club Company to the Company and payable according to the tenor thereof on or before the 30th day of March 1933.

And Whereas the Company has agreed to assign to the Debenture Holders the said amounts payable to the Company by the said Everglades Club Company as aforesaid in consideration of each of the Debenture Holders giving the release hereinafter contained And Whereas it is in the interest of the Company that the said Agreement shall be carried out Now Therefore in consideration of the premises and of the releases hereinafter contained and in consideration of the sum of 1 Dollar each party to the other party paid the receipt whereof is hereby acknowledged This Deed Witnesseth as follows:

1. The Company hereby bargains sells assigns transfers and sets and delivers over unto the debenture holders their executors administrators and assigns all of its right title and interest in and to:

First—All That the sum of Fifty thousand dollars payable by Everglades Club Company to Devon Syndicate Limited on or before 30th March 1929 under Promissory Note dated 22nd March 1928 drawn by Everglades Club Company to the order of Devon Syndicate Limited.

Secondly—All That the sum of Fifty thousand dollars payable by Everglades Club Company to Devon Syndicate Limited on or before the 30th day of March 1930 under Promissory Note dated the 22nd day of March 1928 drawn by Everglades Club Company to the order of Devon Syndicate Limited.

Thirdly—All That the sum of Fifty thousand dollars payable by Everglades Club Company to Devon Syndicate Limited on or before the 30th day of March 1931 under Promissory Note dated the 22nd day of March 1928 drawn by Everglades Club Company to the order of Devon Syndicate Limited.

Fourthly—All That the sum of Fifty thousand dollars payable by Everglades Club Company to Devon Syndicate Limited on or before the 30th day of March 1932 under Promissory Note dated the 22nd day of March 1928 drawn by Everglades Club Company to the order of Devon Syndicate Limited, and

Fifthly—All That the sum of Fifty thousand dollars payable by Everglades Club Company to Devon Syndicate Limited on or before the 30th day of March 1933 under Promissory Note dated the 22nd day of March

*Affidavit of Paris E. Singer*

1928 drawn by Everglades Club Company to the order of Devon Syndicate Limited.

2. The Company hereby constitutes and appoints the said Cecil Mortimer Singer and Paris Graham Singer and each of them its attorneys and/or attorney in its name or otherwise to take all legal measures which may be proper or necessary for the complete recovery and enjoyment of all sums due and payable under and by virtue of the assigned premises.

3. The said Cecil Mortimer Singer hereby releases the Company from all claims for unpaid interest on the said Debentures of the Company Numbered A 121 to A 180 inclusive down to and including the interest which became payable thereon on the 1st day of October last.

4. The said Paris Graham Singer hereby releases the Company from all claims for unpaid interest on the said Debentures of the Company Numbered A 181 to A 240 inclusive down to and including the interest which became payable thereon on the 1st day of October last.

In Witness whereof the Company has caused these presents to be signed in its name by its duly authorized Officer and its Corporate Seal to be hereto affixed and the said Cecil Mortimer Singer and Paris Graham Singer have hereunto set their hands and seals the day and year first above written.

For and on behalf of

Devon Syndicate Limited (Seal)

P. E. Singer President.

Cecil M. Singer (Seal)

P. G. Singer (Seal)

Signed for and on behalf of Devon Syndicate Limited by Paris Eugene Singer its President in the presence of J. Bransbury, Secr. 3 Pancras Lane, London, E. C. 4.

The Corporate Seal of Devon Syndicate Limited was hereunto affixed in the presence of P. E. Singer President, J. Bransbury Secretary.

Signed Sealed and Delivered by the above named Cecil Mortimer Singer in the presence of J. Bransbury as above.

Signed Sealed and Delivered by the above named Paris Graham Singer in the presence of J. Bransbury as above.

*Affidavit of Paris E. Singer***EXHIBIT H.**

This Assignment made the eleventh day of December 1928 Between Devon Syndicate Limited a company incorporated under the laws of the Dominion of Canada and having its office at 120 St. James Street in the City of Montreal Canada (hereinafter called "the Company") of the one part and Cecil Mortimer Singer of Oecombe House, Marlton Paignton in the County of Devon England and Paris Graham Singer of 51 Gloucester Terrace Hyde Park London England (hereinafter referred to as "the Assignees") of the other part Whereas by an Agreement contained in a letter dated the 1st day of February 1929 addressed by Spitzer Rorick & Co. of Toledo Ohio, U.S.A., to the Company a copy whereof is set out in the Schedule hereto certain rights were given to the Company in respect to certain Voting Trust Certificates relating to the Capital Stock of Everglades Club Company a Company incorporated under the Laws of the State of Florida United States of America And Whereas for divers good and valuable considerations passing from the Assignees to the Company the Company has agreed to assign to the Assignee All its rights under the said Agreement of the 1st day of February 1928 And Whereas it is in the interest of the Company that the said Agreement shall be carried out Now therefore in consideration of the premises and in consideration of the sum of One Dollar paid by the Assignees to the Company (the receipt whereof is hereby acknowledged) This Deed Witnesseth as follows:-

1. The Company hereby bargains sells assigns transfers and sets over unto the Assignees their executors administrators and assigns All its rights title and interest under the said Agreement of the said 1st day of February, 1928.

2. The Company hereby constitutes and appoints the said Cecil Mortimer Singer and Paris Graham Singer their attorneys in its name or otherwise to take all legal measures which may be proper or necessary for obtaining the full enjoyment of the premises assigned.

In Witness whereof the Company has caused these presents to be signed in its name by its duly authorized officer and its Corporate Seal to be hereto affixed the day and year first before written.

Devon Syndicate Limited  
(Seal) By P. E. Singer President

*Affidavit of Paris E. Singer*

The Schedule above referred to:-

Toledo, Ohio, Feby. 1st, 1928.

Devon Syndicate Ltd.,  
Montreal, Canada.

Attention—Paris E. Singer, President.

Dear Sirs,

Referring to our agreement of even date herewith under which you assign and transfer to us Voting Trust Certificates representing Five hundred (500) Shares or one half ( $\frac{1}{2}$ ) of total authorized capital stock of the Everglades Club Company.

We hereby confirm our agreement that as part consideration of the said assignment and transfer, we agree to give you the sole and exclusive right to repurchase said voting Trust Certificates at any time prior to February 1st 1933. The price to be paid us by you in case of your exercising your said option at any time prior to February 1st 1930 is \$10,000: the price to be paid us at any time from February 1st 1930 to February 1st 1931 is \$15,000: the price to be paid us from February 1st 1931 to February 1st 1932 is \$20,000: the price to be paid us from February 1st 1932 up to February 1st 1933 is \$25,000.

The foregoing is in favor of yourself, your successors assigns or transferees.

Yours very truly,

(Sgd) Spitzer-Rorick & Co.

H. C. R. W. S. D.

For and on behalf of

Devon Syndicate Ltd.

P. E. Singer President

Signed for and on behalf of Devon Syndicate Limited by Paris Eugene Singer its President in the presence of J. Bransbury Solicitor 3 Pancras Lane, London, E. C. 4.

The Corporate Seal of Devon Syndicate Limited was hereunto affixed in the presence of P. E. Singer President J. Bransbury Secretary. (Seal)

*Affidavit of Paris E. Singer***EXHIBIT J.**

United States of America

State of Florida, Palm Beach County, ss.

3/30/29.

On the 30th day of March in the year of our Lord one thousand nine hundred and twenty-nine at the request of The First National Bank in Palm Beach, Florida, did present the original Instrument hereunto annexed, to a person in charge of the place, where the same is made payable, in the City of Palm Beach, Florida, and demanded payment thereof, which was refused.

Whereupon, I, the said Notary, at the request aforesaid, did Protest, and by these presents do publicly and solemnly Protest, as well against the maker and endorser of said Instrument as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages and interest already incurred, and to be hereafter incurred, for want of payment of the same.

Witness my hand and official seal at said City.

(Sgd.) L. C. Kolb,

Notary Public.

Notary Public, State of Florida  
at Large. My Commission  
expires December 24, 1929.

Official stamp of  
L. C. Kolb,  
Notary Public.

**LETTERS PATENT**

(Filed May 1, 1931)

Incorporating "Devon Syndicate, Limited," (as a Private Company). Dated 26th March, 1923. Recorded 28th March, 1923. A. G. Learoyd, Acting Dep. Registrar General of Canada.

**CANADA**

By the Honourable Arthur Bliss Copp, Secretary of State of Canada.

To all to whom these presents shall come, or whom the same may in anywise concern. Greeting:

Whereas in and by the 1st part of Chapter 79 of the Revised Statutes of Canada, 1906, known as "The Companies Act," and Amending Acts, it is amongst other things in effect enacted that the Secretary of State of Canada may, by Letters Patent under his seal of office, grant a charter to any number of persons, not less than five, who, having complied with the requirements of the Act and Amending Acts, apply therefor, constituting such persons and others who thereafter become shareholders in the company thereby created, a body corporate and politic for any of the purposes or objects to which the legislative authority of the Parliament of Canada extends, except the construction and working of railways or of telegraph or telephone lines, the business of banking, the issue of paper money, the business of insurance, the business of a loan company or the business of a trust company, upon the applicants therefor establishing to the satisfaction of the Secretary of State due compliance with the several conditions and terms in and by the said Act and Amending Acts set forth and thereby made conditions precedent to the granting of such charter.

And whereas, Edward Stuart McDougall and Winchester Henry Biggar, Advocates; Darley Burley-Smith, Clerk; Frank Ashworth, Accountant; and Bertha Hodgson, Secretary, all of the City of Montreal, in the Province of Quebec, have made application for a charter under the said Act and Amending Acts, constituting them and such others as may become shareholders in the company thereby created a body corporate and politic, under the name of



**"DEVON SYNDICATE, LIMITED,"**

for the purposes hereinafter mentioned, and have satisfactorily established the sufficiency of all proceedings required by the said Act and Amending Acts to be taken, and the truth and sufficiency of all facts required to be established previous to the granting of such Letters Patent, and have filed in the Department of the Secretary of State a duplicate of the memorandum of agreement executed by the said applicants in conformity with the provisions of the said Act and Amending Acts.

Now Know Ye that I, the said Arthur Bliss Copp, Secretary of State of Canada, under the authority of the hereinbefore in part recited Act and Amending Acts, do by these Letters Patent, constitute the said Edward Stuart McDougall, Winchester Henry Biggar, Darley Burley-Smith, Frank Ashworth and Bertha Hodgson, and all others who may become shareholders in the said company, a body corporate and politic, by the name of .

**"DEVON SYNDICATE, LIMITED"**

with all the rights and powers given by the said Act and Amending Acts and for the following purposes and objects, namely :

. . . . .

The place within the Dominion of Canada which is to be the chief place of business of the said company, is the City of Montreal in the Province of Quebec.

The capital stock of said company shall be Fifty Thousand (\$50,000) dollars, divided into Five Hundred (500) shares of one Hundred (\$100) dollars each, subject to the increase of such capital stock under the provisions of said Act and Amending Acts.

And it is hereby ordained and declared that the Company shall be deemed to be a private company under the provisions of the Companies' Act and its amendments, with the following restrictions, viz:

1. No shareholder shall have the right to transfer shares registered in his name without the consent of the directors of the company.

2. The number of its shareholders or members, exclusive of persons who are in the employment of the company, and of persons who, having been formerly in the employment of the company, were while in such employment, and have continued after the termination of such employment, to be members of the company, shall not exceed fifty;

*Letters Patent*

3. Any invitation to the public to subscribe for any shares or debentures of the company shall be prohibited.

That the said Edward Stuart McDougall, Winchester Henry Biggar, Darley Burley-Smith, Frank Ashworth and Bertha Hodgson, are to be the first or provisional directors of the said company.

Provided always that nothing in these presents expressed or contained shall be taken to authorize the construction and working of railways or of telegraph or telephone lines, the business of banking, the issue of paper money, the business of insurance, the business of a loan company or the business of a trust company, by the said company.

Given under my hand and seal of office, at Ottawa, this Twenty-Sixth day of March, 1923.

Thomas Mulvey (L.S.)

Under-Secretary of State.

**Endorsements:**

Letters Patent incorporating "Devon Syndicate, Limited" (as a Private Company). Dated 26th March, 1923.

Department of the Secretary of State of Canada  
Registrar's Branch,

Ottawa, 28th November, 1930.

I hereby certify the within to be a true and faithful copy of the record of the original Letters Patent as entered in Liber 289, Folio 209.

● Thomas Mulvey,  
Dep. Registrar General of Canada.

A. Gi-B. D. W.

*Affidavit of Wendell H. Laidley*

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**AFFIDAVIT OF WENDELL H. LAIDLEY**

Consulate of the United States of America:

Wendell H. Laidley, being first duly sworn, deposes and says that he is Assistant Secretary of Devon Syndicate, Limited, one of the defendants named in the above entitled proceeding (whose name, as deponent is informed and believes, was erroneously stated in the plaintiff's petition to be Devon Syndicate, Ltd.); that attached hereto is a true copy of the letters patent incorporating said Devon Syndicate, Limited, duly certified to be a true copy of said letters patent by the Deputy Registrar General of Canada.

W. H. Laidley.

Subscribed and sworn to before me this 29th day of January, 1931.

S. J. Fletcher  
Samuel J. Fletcher,  
Consul of the United States of America.

Stamped: American Foreign Service \$2.00 Fee.  
Service No. 186.

**AFFIDAVIT FOR CONSTRUCTIVE SERVICE**

(Filed Feb. 17, 1936.) /

State of Ohio, County of Lucas, ss.

Horton C. Rorick, being first duly sworn, says that he is the plaintiff in the above entitled action; that defendant, Devon Syndicate, Limited, also sometimes known as Devon Syndicate, Ltd., is a foreign corporation, organized and existing under and by-virtue of the laws of the Dominion of Canada, the last known address of its principal office being the Transportation Building in the City of Montréal, Province of Quebec, Dominion of Canada, and is not a resident or citizen of the State of Ohio, nor does it maintain an office or place of business in the State of Ohio; that service of summons cannot be made upon said defendant in the State of Ohio; that this action is one in which it is sought by provisional remedies of attachment and/or garnishment to take and to appropriate property of said defendant, Devon Syndicate, Limited, in the possession of others within the jurisdiction of this court, and to subject the same to the satisfaction of plaintiff's claim, and comes within the provisions of General Code, Section 11292 of the laws of Ohio, wherein service by publication may be made on said defendant.

Horton C. Rorick.

Sworn to before me and subscribed in my presence this 23rd day of January, 1936.

(Seal) Caroline McLaughlin,  
Notary Public, Lucas County, Ohio.

**LAW SUMMONS ON SUPPLEMENTAL AND  
AMENDED PETITION**

District Court of the United States

Northern District of Ohio, Western Division.

The President of the United States of America

To the Marshal of the Northern District of Ohio—Greeting:

You are hereby commanded to notify Devon Syndicate, Limited, and Paris E. Singer, that they have been sued by Horton C. Rorick, in the District Court of the United States, within and for the Western Division of the Northern District of Ohio, and that unless they answer by the 2nd day of May, A. D. 1936, the petition of the said plaintiff against them filed in the clerk's office of said court, at Toledo, Ohio, in said division and district, such petition will be taken as true, and judgment will be rendered accordingly.

You will make due return of this summons on the 13th day of April, A. D. 1936.

Witness, the Honorable Paul Jones, the Honorable Geo. P. Hahn, the Honorable S. H. West, and the Honorable John M. Killits, District Judges of the United States, and the seal of said Court, this 4th day of April, A. D. 1936, and in the 160th year of the Independence of the United States of America.

F. J. Denzler, Clerk.

(Seal)

By George H. Blossom,

Deputy Clerk.

Indorsement: "Amount Claimed, \$400,000.00 with interest at 6% per annum from June 12, 1930."

Returnable April 13, 1936. Answer day May 2, 1936. \$25.00 deposited for costs.

Fraser, Effler, Shumaker & Winn,

Plaintiff's Attorneys.

**U. S. MARSHAL'S RETURN**

(Filed April 15, 1936)

The United States of America

Northern District of Ohio, ss:

Received this writ at Toledo, Ohio, on April 4, 1936, and on April 6th, 1936, at Toledo, Ohio, the within-named Devon Syndicate, Ltd., and Paris E. Singer could not be found in this district.

George J. Keinath,

U. S. Marshal.

By Jesse T. Sell,

Deputy.

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*Praeipice for Transcript on Appeal***PRAEIPICE FOR TRANSCRIPT ON APPEAL**

(Filed Oct. 6, 1936.)

**To the Clerk:**

Please prepare transcript of record in the above entitled action to be filed in the United States Circuit Court of Appeals for the Sixth Circuit, pursuant to the appeal allowed in said action, and include in said transcript of record the following papers and orders:

1. Title page.
2. Caption.
3. Transcript of proceedings in the Court of Common Pleas of Lucas County, Ohio, filed December 30, 1930.
4. Answer of The Spitzer-Rorick Trust & Savings Bank as garnishee filed January 15, 1931.
5. Motion of Devon Syndicate, Ltd., to quash service and dismiss the attachment filed January 26, 1931.
6. Order granting plaintiff leave to file Supplemental and Amended Petition and Supplemental Affidavit in Garnishment, filed February 17, 1936.
7. Supplemental and Amended Petition, filed February 17, 1936.
8. Supplemental Affidavit in Garnishment filed February 17, 1936.
9. Return of marshal on service of order of garnishment on The Spitzer-Rorick Trust & Savings Bank and the notice to said garnishee, filed on February 26, 1936.
10. Motion of Devon Syndicate, Ltd., to quash service of summons and dismiss attachment, filed April 11, 1936.
11. Answer of The Spitzer-Rorick Trust & Savings Bank as garnishee, filed April 22, 1936.
12. Memorandum Opinion of Judge Hahn, filed June 24, 1936.
13. Journal Entry filed July 11, 1936.
14. Order extending time to file Bill of Exceptions entered and filed August 22, 1936.
15. Order extending time to October 28, 1936, to lodge narrative form of testimony and file and settle Bill of Exceptions, filed September 29, 1936.
16. Petition for Appeal, filed September 29, 1936.
17. Assignment of Errors, filed September 29, 1936.
18. Order Allowing Appeal and fixing the amount of the appeal bond, filed September 29, 1936.
19. Appeal Bond, filed September 29, 1936.
20. Citation on Appeal, filed October 1, 1936.

**ORDER**

(Filed Dec. 21, 1936)

It is hereby ordered that the clerk of this court be and he is hereby authorized to certify that the printed record of this case as received from the printer contains a full, true and complete copy of the record and all proceedings in this case, including the petition for appeal, assignment of errors, order allowing appeal, and the bond on appeal, in accordance with praecipe for transcript and counter-praecipe for transcript filed herein, without further or other actual comparison with the original papers filed in this case.

Geo. P. Hahn,  
United States District Judge.

Approved:

Fraser, Effler, Shumaker & Wimm,  
Attorneys for Plaintiff-Appellant.

*Praeipie for Transcript on Appeal*

21. Affidavit of Service of Citation on Appeal, filed October 1, 1936.

22. Plaintiff's Narrative Bill of Exceptions and Order approving the same, filed October 15, 1936.

23. All Orders entered subsequently hereto extending time for filing transcript in the Circuit Court of Appeals and for filing defendant's Counter-Praeipie, and any other orders or papers entered or filed herein subsequently hereto.

24. This Praeipie for Transcript of record on appeal.

25. Stipriation between counsel relative to certification of record, and all other stipulations between counsel for the parties hereinafter filed, relative to the record on appeal.

26. Clerk's certificate.

Please deliver papers to the H. J. Chittenden Publishing Company, Toledo, Ohio, for printing.

Fraser, Effler, Shumaker & Winn,  
Attorneys for Plaintiff.

Harold W. Fraser,  
George R. Effler,  
R. B. Swartzbaugh,  
Of Counsel.

To Messrs. Welles, Kelsey & Cobourn,  
George D. Welles, Fred Fuller,  
and Fred A. Smith,

Attorneys for Defendant, Devon Syndicate, Ltd.

You are hereby notified that the plaintiff-appellant in the above entitled action will file forthwith the foregoing praecipie indicating the portions of the record he desires to have incorporated in the transcript of record on appeal.

Dated October 2, 1936.

Harold W. Fraser,  
George R. Effler,  
R. B. Swartzbaugh,  
Of Counsel for Horton C. Rorick,  
Plaintiff-Appellant.

Service of the foregoing praecipie and receipt of copies thereof are hereby acknowledged on behalf of said defendant-appellee, Devon Syndicate, Ltd., this 2nd day of October, 1936.

.....  
Of Counsel for said Defendants-Appellees.

**COUNTER PRAECIPE**

(Filed Oct. 14, 1936)

To the Clerk:

Appellee, Devon Syndicate, Limited, for the sole purpose of having incorporated in the record an appeal additional papers which are necessary to fully present the questions raised by the appeal herein with respect to its motion for an order quashing the pretended service of summons and setting aside the return thereof and dismissing the pretended attachment and garnishment, and its motion for an order quashing the pretended service of summons on the supplemental and amended petition and setting aside the return thereof and dismissing the pretended attachment and garnishment made on the supplemental affidavit in garnishment, and not intending hereby to waive any question of the sufficiency of the service of process, or the want of service of process on it, but expressly reserving all questions of service of process, jurisdiction and want of service of process on it, and not entering or intending to enter its appearance herein, hereby requests, pursuant to the provisions of Rule 15 of the Rules of the United States Circuit Court of Appeals for the Sixth Circuit, that you incorporate into the transcript of record, on the appeal herein, in addition to the portions of the record indicated by appellant herein by his praecipe to be included in the transcript of record herein, the following:

	Filing Date	Filing Number in District Court
1. Affidavit of Paris E. Singer in Support of Motion of Devon Syndicate and Exhibit F attached thereto...	May 1, 1931	14
2. Affidavit of Wendell H. Laidley and certified copy of letters patent incorporating Devon Syndicate, Limited, attached to said affidavit, omitting numbered pages one to five inclusive. ....	May 1, 1931	19
3. Affidavit for constructive service .....	Feb. 17, 1936	26
4. Complete return of Marshal of order of attachment .....	Feb. 26, 1936	28A
(Same as paper 28 asked for in original Praecipe)		

*Counter Praeipie*

5. Summons on supplemental and amended petition and return thereon ..... Apr. 15, 1936 30  
 6. This counter praecipe ..... Oct. 14, 1936 57  
 Dated October 14, 1936.

Welles, Kelsey & Cobourn,  
 Attorneys for appellee, Devon  
 Syndicate, Limited

To Messrs. Fraser, Effler, Shumaker & Winn,  
 Harold W. Fraser  
 George R. Effler and  
 R. G. Swartzbaugh,

Attorneys for plaintiff, Horton C. Rorick.

You are hereby notified that the defendant-appellee in the above entitled action will file forthwith the foregoing counter praecipe indicating the additional portions of the record it desires to have incorporated in the transcript of record on appeal.

October 14, 1936.

Welles, Kelsey & Cobourn.

Service of the foregoing counter praecipe and receipt of copies thereof are hereby acknowledged on behalf of plaintiff-appellant, Horton C. Rorick, this 14th day of October, 1936.

Fraser, Effler, Shumaker & Winn,  
 Attorneys for plaintiff-appellant.



**CERTIFICATE OF CLERK**

Northern District of Ohio, ss.

I. F. J. Denzler, Clerk of the United States District Court within and for said district, do hereby certify that the foregoing printed pages contain a full, true and complete copy of the record and all proceedings in this cause, including the petition for appeal, assignment of errors, order allowing appeal, and the bond on appeal, in accordance with the praecipe for transcript, and counter praecipe for transcript, filed herein, the originals of which, except certain exhibits withdrawn by leave of Court, remain in my custody as Clerk of said Court.

There is also attached to and transmitted herewith the citation issued and allowed herein.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court, at Toledo, in said district, this 15th day of December, A. D. 1936, and in the 161st year of the Independence of the United States of America.

F. J. Denzler, Clerk,

(Seal)

By K. V. Wilson, Deputy Clerk.



PROCEEDINGS IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

**CAUSE ARGUED AND SUBMITTED**

(November 18, 1938—Before: HICKS, SIMONS  
and ALLEN, JJ.)

This cause is argued by R. B. Swartzbaugh for Appellant and by F. E. Fuller and Geo. D. Welles for Appellees and is submitted to the court.

**JUDGMENT**

(Filed January 11, 1939)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

## OPINION

(Filed January 11, 1939)

Before HICKS, SIMONS and ALLEN, Circuit Judges.

SIMONS, Circuit Judge. The question for decision involves the validity of an attachment upon the property of a foreign corporation first sued out in an Ohio court and later sought to be perfected after removal of the cause to the United States District Court. The appeal is from an order discharging the attachment and dismissing the action.

The appellant seeking to recover \$400,000 alleged to be due him under a contract for personal services, filed a petition in the State court against Devon Syndicate, Ltd., a Canadian corporation of Quebec, and Paris E. Singer, a resident of Paris, France, as defendants. Concurrently with the filing of his petition he filed an affidavit in attachment and garnishment, subscribed and sworn to by the appellant before D. W. Drennan, a Notary Public and an attorney in the employ of Spitzer-Rorick & Co., a corporation of which the appellant was president. The summons issued for the defendants was returned with the certification that they could not be found. Orders of attachment were returned unsatisfied, but return was made of service of notices of garnishment on the several garnishees, some of whom thereafter disclosed funds or property in their possession belonging to the defendants. On July 27, 1930, a new affidavit in garnishment and attachment was filed, likewise subscribed and sworn to before Drennan, though no new order of attachment issued thereon. The garnishee defendants were, however, again notified of the attachment and garnishment. On October 10, 1930, the appellant filed an affidavit for constructive service. Publication began on October 11th, and following completion the cause was, on December 5, 1930, removed to the United States District Court.

There, on January 26, 1931, the appellee appeared specially and moved for an order quashing the service of summons and dismissing the attachments and garnishments. On May 1st its co-defendant Singer filed an affidavit in support. Singer subsequently died, and the cause was continued against the present appellee alone. On February 17, 1936, the appellant filed in the District Court a supplemental and amended petition substantially

*Opinion*

identical with his original petition, and a direction to the Clerk to issue an order of attachment and garnishment, to be served upon the identical garnishees already served in the State court proceedings. Concurrently he filed a supplemental affidavit in attachment and garnishment sworn to before a Notary other than Drennan. An order of attachment issued to the Marshal and was returned by him to show service of a copy thereof, together with a garnishment notice upon the several garnishees, whereupon on the same date the appellant filed an affidavit for constructive service by publication under the provisions of Ohio General Code, § 11292. On April 11, 1936, the appellee again appearing specially, moved to quash the new summons and to dismiss the second attachment and garnishment.

Upon hearing the court dismissed the attachment upon two main grounds. It held the first two affidavits in support of the writ defective under G. C. Ohio, §§ 11523, 11524, and 11532, the last of which provides,

“The officer before whom depositions are taken must not be a relative or attorney of either party or otherwise interested in the event of the action or proceeding.”

and that they could not be amended by the supplemental affidavit filed in the United States Court. It also held that the attempted attachment and garnishment based upon the supplemental and amended petition in the District Court was void and of no effect because personal service had not been obtained upon the appellee. It directed that the action might remain pending for the purpose of procuring proper service, but being advised that the plaintiff desired no further time or opportunity for obtaining personal service of process, it ordered the petition and supplemental petition to be stricken from the files.

We give little consideration to the first ground upon which the attachment was quashed. While there is persuasion in the argument that under § 11532 the “attorney for either party” who is precluded from taking the acknowledgment is one who represents one of the parties to the controversy in which the affidavit is to be used, and Drennan represented neither, and that officers “otherwise interested” who are foreclosed by the stat-

*Opinion*

ute are those only who have some legal, material, and immediate interest in the controversy, yet for reasons presently to be discussed, decision upon this point is unnecessary, and since the statute has been amended (G. C. § 11356), will serve no purpose.

Under § 11819 of the Ohio General Code, in a civil action for the recovery of money, an attachment may be obtained against the property of a non-resident defendant "at or after" the commencement of the action. We have recently held, *Doherty v. Cremering, et al.*, 83 Fed. (2d) 388, in reliance upon *Seibert v. Switzer*, 35 O. S. 661; cf. *Henrietta Mining & Milling Co. v. Gardner*, 173 U. S. 123, that an attachment issuing before personal service is obtained, or before the beginning of the publication for substituted service provided for by G. C. § 11292, is premature and void. The case of *Bacher v. Shawhan*, 41 O. S. 271, was there considered and held not to overrule the *Seibert* case, since it did not construe the statute. We are not persuaded that the present cause, insofar as it involves the timeliness of the attachment in the State court, is to be distinguished from the *Cremering* case, or that that case was wrongly decided.

We come then to consider the effectiveness of the appellant's amended and supplemental petition with its accompanying affidavit and attachment in the District Court to create a valid lien on money or property in the hands of the garnishee defendants. It has always been held that an attachment cannot be sued out against the property of a non-resident in a District in which he cannot be sued. When this doctrine was announced defendants could be sued only in Districts of their residence or in which they might be found. Since the attachment is but an incident to a suit, unless the suit can be maintained the attachment must fail. *Ex parte Railway Company*, 103 U. S. 794. When the statute was amended to permit suits in the Federal court in the District of the residence of either the plaintiff or the defendant, it was contended that the District Court of the District of the plaintiff's residence now had jurisdiction to attach a defendant's property found therein. The contention was rejected. *Big Vein Coal Co. of West Virginia v. Read*, 229 U. S. 31, on the ground that the amendment was not intended to do away with the



*Opinion*

settled rule, but in order to issue an attachment the defendant must be subject to personal service or voluntarily appear in the action, for if Congress had intended any such radical change it would have been easy to have made provision for that purpose.

The suit in the Big Vein Coal Company case was, however, begun in the Federal court; and it is the appellant's contention that the rule there announced does not reach a case removed from the court of a state which permits attachments upon substituted service, and that such attachments are permitted by § 36, Judicial Code, and R. S. 915, being respectively §§ 79 and 726, T. 28, U. S. C. A. The first provides that when any suit shall be removed from a state court to a district court of the United States any attachment in such suit shall hold the goods or estate so attached to answer the final judgment or decree, in the same manner as by law they would have been held to answer the state court judgment or decree. The second provides that in common law causes in the district courts the plaintiff shall be entitled to similar remedies by attachment or other process, against the property of the defendant which are provided by the laws of the State. No decision of the Supreme Court or of a Circuit Court of Appeals has interpreted these sections to permit the Federal court to enforce an attachment not perfected in the state court proceedings, or as setting aside the universally accepted rule that an attachment may not issue in the Federal court until personal service has been had upon the defendant. In the only case to which our attention has been directed, *Cleveland & Western Coal Co. v. J. H. Hillman & Sons Co.*, 245 Fed. 200; the late District Judge Westenhaver of the court below held that an attachment will not lie without personal service on the defendant, which is indispensable notwithstanding R. S. 915, and that a Federal court is without jurisdiction to issue an attachment upon property of defendants not personally served with summons even if the cause be removed from the court of a state which permits it.

Of import is the language of the court in the Big Vein Coal Company case, *supra*: "An attachment is still but an incident to a suit and . . . unless jurisdiction can be obtained over the defendant his estate cannot be attached in a Federal court." In *Hatcher v. Hendrie &*

*Opinion*

*Bolthoff Mfg. & Supply Co.*, 133 Fed. 267 (C. C. A. 8), it was pointed out by Circuit Judge, later Mr. Justice Van Devanter, that when an action or suit in a state court is removed into a Circuit Court of the United States the latter takes the case in the condition in which it existed in the state court at the time of the removal; and if a lien or other right has been obtained by either party by any proceeding had in the case prior to the removal, power to protect and enforce that lien or right after removal exists in the Circuit Court in like manner as if it had been obtained by a proceeding in that court. The necessary implication is that where a case is removed from a state court without a valid lien having been obtained therein, there is no jurisdiction to perfect an incomplete lien proceeding when the defendant is not brought within the jurisdiction of the court.

The judgment below is affirmed.

**UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

I, J. W. MENZIES, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of *Horton D. Rorick v. Devon Syndicate, Ltd.*, No. 7609, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 25th day of January, A. D. 1939.

J. W. MENZIES,

*Clerk of the United States Circuit Court  
of Appeals for the Sixth Circuit.*

(SEAL)

**SUPREME COURT OF THE UNITED STATES**

**ORDER ALLOWING CERTIORARI—Filed March 27, 1939**

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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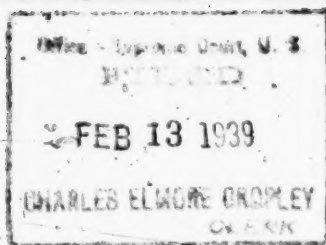
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IN THE  
**Supreme Court of the United States**

October Term, 1939

\_\_\_\_\_  
No. 676 \_\_\_\_\_

HORTON C. RORICK,

*Petitioner,*

*vs.*

DEVON SYNDICATE, LIMITED, A CANADIAN  
CORPORATION,

*Respondent.*

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SIXTH CIRCUIT AND BRIEF IN  
SUPPORT THEREOF**

\_\_\_\_\_  
H. W. FRASER,  
710 Home Bank Bldg., Toledo, Ohio,  
*Counsel for Petitioner.*

FRASER, EFFLER, SHUMAKER & WINN,  
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R. B. SWARTZBAUGH,  
710 Home Bank Bldg., Toledo, Ohio,  
*Of Counsel.*





IN THE  
**Supreme Court of the United States**

October Term, 1939

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No. ....

---

HORTON C. RORICK,

*Petitioner,*

vs.

DEVON SYNDICATE, LIMITED, A CANADIAN  
CORPORATION,

*Respondent.*

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SIXTH CIRCUIT AND BRIEF IN  
SUPPORT THEREOF**

---

H. W. FRASER,  
710 Home Bank Bldg., Toledo, Ohio,  
*Counsel for Petitioner.*

FRASER, EFFLER, SHUMAKER & WINN,  
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710 Home Bank Bldg., Toledo, Ohio,  
*Of Counsel.*

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IN THE  
**Supreme Court of the United States**

October Term, 1939

---

No.....

---

HORTON C. RORICK,

*Petitioner,*

*vs.*

DEVON SYNDICATE, LIMITED, A CANADIAN  
CORPORATION,

*Respondent.*

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SIXTH CIRCUIT AND BRIEF IN  
SUPPORT THEREOF**

---

*To the Honorable the Supreme Court  
of the United States:*

o Your petitioner respectfully shows:

**I. STATEMENT OF CASE**

On January 19, 1930, the petitioner, a resident of Toledo, Ohio, filed suit in the Common Pleas Court of Lucas County, Ohio, against the respondent, a non-resi-



dent corporation, on a claim for Four Hundred Thousand Dollars (\$400,000) with interest, under a written contract. Summons was immediately issued for the defendants. (R. 2.) An affidavit in attachment and garnishment was filed with the petition and orders of attachment and garnishment were issued and served pursuant thereto. (R. 6.)

On June 27, 1930, a second affidavit was filed describing other property of respondent and orders of attachment and garnishment were issued and served pursuant thereto. (R. 12.)

On October 10, 1930, an affidavit for constructive service was filed and service by publication commenced. (R. 15.)

On December 5, 1930, the respondent appeared specially and removed the case to the District Court. (R. 18.)

On January 15, 1931, The Spitzer Rorick Trust & Savings Bank filed its answer as garnishee, stating that it was indebted to the respondent on two special deposit accounts in the amounts of \$9,255.95 and \$20,258.42, respectively. (R. 25.)

On January 26, 1931, the respondent still appearing specially, moved the District Court for an order quashing and discharging the attachments. (R. 26.)

On February 17, 1936, before any disposition of the foregoing motion, petitioner filed a supplemental and amended petition (R. 29), together with a supplemental affidavit in garnishment. (R. 33). The amended petition is identical to the original in all respects material to this appeal. The supplemental affidavit in garnishment,

however, described in addition certain property of the respondent not previously attached.

On April 11, 1936, the respondent again appeared specially and moved the District Court for an order discharging the attachment and garnishment secured under the supplemental affidavit. (R. 43.)

On April 22, 1936, The Spitzer Rorick Trust & Savings Bank filed a supplemental answer as garnishee, reporting that it was holding the further sum of \$17,576.08 pursuant to the attachment under the affidavit filed in the District Court. (R. 44.)

The District Court held that the affidavits in attachment and garnishment filed in the state court were void, because they were acknowledged before a notary public, who, in the court's opinion, was disqualified; that they could not be amended or validated by any proceedings in the District Court after removal. Said court further held that the attachment under the affidavit filed in the District Court could not be sustained without personal service, and thereupon discharged the attachments, quashed all summons and struck the petition and amended and supplemental petition from the files. (R. 47.)

On appeal, the Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court on the specific ground that the attachments and garnishments in the state court, prior to removal, were premature and void because they were secured prior to the first publication of notice, and that an attachment could not be secured under an affidavit filed after removal without personal service. (R. 94.)

## II. REASONS URGED FOR ALLOWANCE OF WRIT

(a) In holding that an attachment secured in Ohio, after the filing of a petition and the issuance of summons, but prior to the first publication of notice, is premature and void, the said Circuit Court of Appeals has taken a position which is directly and irreconcilably in conflict with the decisions of the Supreme Court of Ohio in *Seibert vs. Switzer*, 35 O. S. 661, and *Bacher vs. Shawhan*, 41 O. S. 271, and numerous lower court decisions, and has thrown the well established law of Ohio relating to attachment and garnishments involving non-residents into utter and complete chaos and confusion.

(b) The Court of Appeals erroneously construed Sections 79 and 726 of Title 28, U. S. C. A. (R. S. Sec. 646 and Sec. 915, respectively), in quashing the garnishment secured under the affidavit filed in the District Court after removal.

Wherefore, your petitioner prays that a writ of *certiorari* issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said Circuit Court had in the case entitled, "*Horton C. Rorick, Appellant, vs. Devon Syndicate, Limited, Appellee*," being Cause No. 7609 on the docket of said court, to the end that this cause may be reviewed and determined by this court as provided for by the Statutes of the United States, and that the judgment herein of said Circuit Court be reversed by this

court; and for such further relief as to this court may seem proper.

Dated February 9, 1939.

HORTON C. RORICK,  
*Petitioner,*

By HAROLD W. FRASER,  
*Counsel for Petitioner.*

GEORGE R. EFFLER,  
R. B. SWARTZBAUGH,  
*Of Counsel.*



IN THE  
SUPREME COURT OF THE UNITED STATES

February Term, 1939

No.....

HORTON C. ROBICK,

*Petitioner,*

*vs.*

DEVON SYNDICATE, LIMITED, A CANADIAN  
CORPORATION,

*Respondent.*

**BRIEF IN SUPPORT OF FOREGOING PETITION**

**I. OPINIONS BELOW**

The opinion of the District Court is found at page 47, *et seq.* of the record, and the opinion of the Circuit Court at page 94, *et seq.* The latter opinion is reported in ... F. (2d) ....

**II. JURISDICTION**

The date of the judgment to be reviewed is January 11, 1939 (R. 93), and is reviewable under Sec. 240(a) of the Judicial Code (U. S. Code, Title 28, Sec. 347), as amended by the Act of Congress approved February 13, 1925, C. 229, Sec. 1, 43 Stat. 938.



### III. ARGUMENT

#### (a) Decision of Court Below Conflicts with Decisions of Ohio Supreme Court

The sequence of events is stated in Part I of the foregoing petition, and thus need not be repeated here.

The court below squarely held that in Ohio an attachment secured after the filing of a petition and the issuance of summons, but prior to the first publication of notice was premature and void.

This holding is directly in conflict with the following decisions of the Supreme Court of Ohio and other courts in that state.

- Bacher vs. Shawhan, 41 O. S. 271;
- Seibert vs. Switzer, 35 O. S. 661;
- Lessee of Paine vs. Mooreland, 15 Oh. 435;
- St. John vs. Parsons, 54 Oh. App. 420, 8 Oh. Op. 169, 23 Ohio Abs. 432;
- Citizens National Bank vs. Union Central Insurance Co., 12 Oh. C. C. (N.S.) 401;
- Royal Indemnity Co. vs. Agrios, 7 Oh. Op. 272, 22 Oh. Abs. 312.
- Central Savings Bank vs. Langenbach et al., 1 Oh. N. P. 124.
- See 4 Ohio Jurisprudence 68, Sec. 44.

In *Bacher vs. Shawhan*, 41 O. S. 271, *supra*, the facts are stated in the syllabus which follows:

"1. In an action where property is attached and summons returned 'not served,' no time is fixed by statute within which service by publication must be made.

2. Hence: Where the service by publication was not completed until eight months after the return of summons, it is error to dismiss the action for an alleged want of jurisdiction by reason of such delay."

And in *Seibert vs. Switzer*, 35 O. S. 661, *supra*, there is the following syllabus:

"1. An attachment, under the civil code, is an auxiliary proceeding in an action, which may be sued out by the plaintiff, at or after the commencement of such action, by filing a petition and causing a summons to issue thereon.

2. About 11 o'clock A.M., an order of attachment was issued upon the filing of an affidavit and giving bond. It was served and returned about 3 o'clock P.M., but no petition was filed until about 6 o'clock P. M. of the same day. *Held*, that the attachment was issued without authority of law, and as against other attaching creditors and lien holders gave no priority."

At page 665, the court said:

"An action is commenced or brought, within the meaning of Sections 192 and 193, by the filing of a petition and causing a summons to issue thereon. Code, Sec. 55. Until then there is no action in which an attachment can issue."

In *St. John vs. Parsons*, 54 Oh. App. 420, *supra*, a petition was filed and summons issued which was later returned "Not found." An affidavit was filed with the petition and an attachment levied on real estate before service by publication was begun. The language quoted below appears at page 422 of the report:

"The order of attachment will not be set aside because issued before the service by publication was begun."

There is the following paragraph in the syllabus in *Citizens Bank vs. Union Central Life Insurance Co.*, 12 Oh. C. C. (N.S.) 401, *supra*:

- "3. An action has been begun under the attachment law when the petition has been filed and summons issued thereon, and the order of attachment will not be set aside because issued before the service by publication was begun."

The syllabus in *Royal Indemnity Co. vs. Agrios*, 7 Oh. Op. 272, *supra*, follows:

- "1. An attachment may issue immediately upon the filing of the petition or any time thereafter, if grounds therefor exist so long, as the petition is *bona fide* and the steps required to complete the commencement of the action are followed with due diligence."

And in *The Central Savings Bank vs. Langenbach*, 1 N. P. 124, *supra*, there is the following syllabus:

- "1. In an action where property is attached, and summons returned 'not served,' and the defendant is brought in by publication, made eight months after the return of summons, the lien of the attachment thus created will be superior to the liens of attachments issued and levied on the same property after the commencement of such action, and before said publication was made.

- "2. An action is not commenced alone by filing a petition and an affidavit for publication, and making publication, but a summons must be issued whether service can be had only by publication or not.

- "3. Property seized under an order of attachment issued in a case where no summons was issued, creates no valid lien on the property as against other lien holders."

The Ohio text book rule is stated in *Vol. 4 Oh. Jur.* 68, *Sec. 44*, as follows:

"An attachment issued after the filing of the petition and after the issuance of the summons, is issued at or after the commencement of the action within the meaning of the statute. An attachment issued with the summons after the petition is filed, is issued at the commencement of the action."

The procedural details for securing an attachment in Ohio have been well settled, since the decision by the Supreme Court of Ohio in *Lessee of Paine vs. Mooreland*, (1846) 15 Oh. 435, *supra*, where it was expressly held that a court acquired jurisdiction in attachment by the issuing of process, predicated upon a petition, and the attaching of property under a requisite affidavit.

*Ohio General Code, Sec. 11279* provides:

"A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

*Ohio General Code, Sec. 11819* provides, so far as material:

"In a civil action for the recovery of money, *at or after its commencement*, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:" (Grounds omitted.)

The court below relies upon its decision in *Doherty vs. Cremering et al.*, 83 F. (2d) 388, and upon *Seibert vs. Switzer*, 35 O. S. 661, *supra*.

In the *Seibert* case no petition had been filed nor any summons issued when the attachment was secured, and in *Henrietta Mining & Milling Co. vs. Gardner*, 173 U. S. 123, also relied upon, the judgment below was attacked

on the ground that "the attachment was void because the writ was issued before the issuance of summons."

With all due respect, it is submitted that the language of the Circuit Court below in *Doherty vs. Cremering*, interpreting *Bacher vs. Shawhan*, 41 O. S. 271, *supra*, and *Seibert vs. Switzer*, 35 O. S. 661, *supra*; is utterly incomprehensible. The opinion fails to state when summons issued, and the court then purports to follow the rule announced in the *Seibert* case on the theory that it was not overruled by the later *Shawhan* case. Obviously, the *Shawhan* case does not overrule the *Seibert* case because the facts are entirely different and the legal principles announced are entirely consistent. But it is a mystery how the Circuit Court could find support in the *Seibert* case for its decision in *Doherty vs. Cremering*, or in its decision below. The case of *Seibert vs. Switzer* expressly holds that an attachment may be secured at any time after the filing of a petition and issuance of summons.

In short, there is absolutely no precedent to support the decision of the court below.

In spite of the fact that summons was issued at the time the petition was filed in the case at bar, bringing it within the provisions of Ohio General Code Sections 11279 and 11819, quoted *supra*, the Circuit Court has held that Ohio General Code Section 11230 is controlling. This section is quoted below:

"An action shall be deemed to be commenced *within the meaning of this chapter*, as to each defendant, at the date of the summons which is served on him or on a co-defendant who is a joint contractor, or otherwise united in interest with

him. When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication, if it be regularly made." (Italics ours.)

Ohio General Code Section 11231 follows:

"*Within the meaning of this chapter*, an attempt to commence an action shall be deemed to be equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt be followed by service within sixty days." (Italics ours.)

Construing Ohio General Code Section 11231, the Supreme Court of Ohio in *Bacher vs. Shawhan*, 41 O. S. 271, *supra*, uses the following language at page 272:

"It will be observed that the restrictive words 'within the meaning of this chapter' confine the operation of this section to matters concerning the limitation of actions."

Both sections of the Code quoted above are in the chapter on "Limitations of Actions," and the same reasoning applies equally to Section 11230.

In *Royal Indemnity Company vs. Agrios*, 7 Oh. Op. 272, the court clearly analyzes the Ohio statutes, and holds that Ohio General Code Section 11230 has no application where a petition had been filed and summons issued.

On principle, the decision of the Circuit Court is obviously wrong. The statutes of Ohio providing for attachments involving non-resident defendants were the same in all material respects in 1860 as they are today.

See: Swan & Critchfield; Revised Statutes of Ohio (in force August 1, 1860), Vol. 2, page 1002.



Clearly the legislature never intended to require publication before an attachment. In 1860 such a requirement would have prevented a successful attachment, because there were few, if any, daily newspapers. Even under present conditions the necessity of securing an attachment and publication on the same day would be extremely difficult, if not impossible, and the absurdity of such a requirement should be self-evident.

In Ohio the attachment statutes are remedial in nature and are to be liberally construed. This is expressly provided in Ohio General Code Section 10214 and the following cases so hold:

Hart vs. Andrews, 103 O. S. 218; 132 N. E. 846;

Weirick vs. Mansfield Lumber Co., 96 O. S. 386, 117 N. E. 362;

Bridge vs. Ring, 25 Oh. App. 149, 157 N. E. 496.

#### **(b) Decisions of the Ohio Supreme Court Are Controlling**

In spite of the well established rule in Ohio that an attachment may be secured after the filing of a petition and the issuance of summons, although prior to the first publication of notice, the court below held that such an attachment is premature and void.

28 U. S. C. A., Sec. 724 (R. S. Sec. 914), provides:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such district courts are held, any rule of court to the contrary notwithstanding."

The rule is now well settled that except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state as declared by its legislature in a statute or by its highest court.

Erie Railroad vs. Tompkins, 304 U. S. 64,  
82 L. Ed. 1188, 58 Sup. Ct. 817;

Willing vs. Binenstock, 302 U. S. 272, 82 L.  
Ed. 248, 58 Sup. Ct. 175;

Mutual Life Insurance Co. vs. Johnson, 293  
U. S. 335, 79 L. Ed. 398, 55 Sup. Ct. 154;

Marine Bank vs. Kalt-Zimmers, 293 U. S.  
357, 79 L. Ed. 427, 55 Sup. Ct. 226;

Burns Mortgage Co. vs. Fried, 292 U. S.  
487, 78 L. Ed. 1380, 54 Sup. Ct. 813.

Applying the foregoing rule, it has been repeatedly held in actions involving attachments authorized by the statutes of a state, that the federal courts apply and enforce such remedies, adopting and following the interpretation of the statutes by the highest court of the state.

Loewe vs. Savings Bank, 236 Fed. 444, aff'd  
242 U. S. 357;

Perez vs. Fernandez, 202 U. S. 80, 50 L. Ed.  
942, 26 Sup. Ct. 561;

Fleitas vs. Cockren, 101 U. S. 301, 25 L.  
Ed. 954;

Beach vs. Viles, 27 U. S. 675, 2 Peters 675;

LaVarre vs. International Paper Co., (D.  
C., S. C.) 37 F. (2d) 141;

Wheeling Traction vs. Pennsylvania Co., (D.  
C., Ohio) 1 F. (2d) 478;

Pere Marquette Railway vs. Western Dis-  
patch, (D. C., Mich.) 284 F. 574.

It follows that the courts below were bound by the decisions of the Ohio Supreme Court in *Bacher vs. Shawhan*, 41 O. S. 271, *supra*, and *Seibert vs. Switzer*, 35 O. S. 661, *supra*, and should have followed the rule laid down in those cases that an attachment after the filing of a petition and the issuance of summons is not premature, although before publication of notice.

**(c) The Decision Below Conflicts With Previous  
Decision of This Court**

This court has held that where an action has been commenced in the state court and property attached, the plaintiff, after removal, may complete service by publication, or if not commenced, the plaintiff can commence publication.

Clark vs. Wells, 203 U. S. 164, 172, 51 L. Ed. 138, 27 Sup. Ct. 43.

In so ruling, this court necessarily held that an attachment secured after the commencement of the action, but prior to publication, was not premature and void and it has been likewise held in the following case:

Friedman Brothers Co. vs. Greaney, (D. C., N. Y.) 297 Fed. 478.

See also:

Purdy vs. Wallace Moore & Co., (C. C., Mass.) 81 Fed. 513.

**(d) District Court Erred in Holding Notary Public  
Disqualified**

The District Court held that the notary public on the affidavits filed in the state court was disqualified because

he was an employee of a partnership of which the plaintiff (petitioner) was a member. In so holding the said court clearly erred. The claim was an individual and not a partnership claim, and the notary had no other connection with the case whatsoever. (R. 61.)

The Circuit Court did not find it necessary to pass upon the point but stated that there was "persuasion" in the argument that said notary was not disqualified. (1) because he was not an attorney in the case, and (2) because to be "otherwise interested" in the case under the Ohio statute (G. C. Sec. 11532) the interest must be some "legal, material and immediate interest" in the controversy. The Circuit Court indicated the proper rule and the trial court clearly was in error.

Bevan vs. Krieger, 289 U. S. 459, 77 L. Ed. 1316, 53 Sup. Ct. 661;

Tumey vs. Ohio, 273 U. S. 510, 523, 71 L. Ed. 749, 47 Sup. Ct. 437;

Rhinelanders vs. Pittsburgh Co., 15 O. C. C. (N.S.) 286.

**(e) An Affidavit Improperly Acknowledged May Be Amended by a Proper Acknowledgment**

Even if the affidavit filed in the state court had been defective because improperly acknowledged, or for any other reason, the defect, if any, was cured by the amended and supplemental affidavit filed in the District Court after removal.

28 U. S. C. A., Sec. 777 (R. S. Sec. 954);

Ernststein vs. Rothschild, (C. C., Mich.) 22 Fed. 61;

Booth vs. Denike, (C. C., Tex.) 65 Fed. 43;

Nevada Co. vs. Farnsworth, (D. C., Utah)  
89 Fed. 164;

Bowden vs. Burnham, (C. C. A. 8) 59 Fed.  
752;

Salmon vs. Mills, (C. C. A. 8) 68 Fed. 180.

The only prerequisite to an amendment is to have an action pending.

28 U. S. C. A., Sec. 777, provides, so far as material:

"No summons \* \* \* or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form, \* \* \* and such court shall amend every such defect and want of form \* \* \*."

The uniform rule in the United States is that an attachment affidavit, improperly acknowledged, is not a nullity and may be amended by swearing to it before another notary. It is not necessary thereafter to secure any further service of the order of attachment.

Ramsey Motor Co. vs. Wilson, (Wyo.) 30  
P. (2d) 482;

Sweringen vs. Howser, 37 Kan. 126, 14 P.  
436.

Frenzer vs. Phillips, 57 Neb. 229, 77 N. W.  
668;

Heidelberger vs. Heidelberger, 196 App.  
Div. 626, 187 N. Y. S. 864.

Therefore, even if the notary on the affidavits filed in the state court had been incompetent to act, which he was not, the affidavit filed in the federal court after removal would have cured that as well as any other defect. No further service or order of attachment is necessary.

This is likewise true under 28 U. S. C. A., Sec. 777 (R. S. Sec. 954), quoted above.

**(f) The Attachment Secured After Removal to the District Court Is Valid**

As already shown, the courts below erred in holding that the attachments secured prior to removal were invalid.

Said courts likewise erred in holding that the attachment of \$17,576.08 secured after removal under the affidavit filed in the District Court was invalid because the defendant was not personally served.

Both courts below relied upon the decision of this court in *Big Vein Coal Company vs. Read*, 229 U. S. 31; 33 S. Ct. 694; 57 L. Ed. 1053, which construes 28 U. S. C. A., Sec. 112 (R. S. Sec. 739).

That case, however, was commenced in a Federal District Court whereas the case at bar was commenced in a state court and thereafter removed by the defendant to the District Court. For this reason, entirely different considerations and principles are involved, and the rule laid down in the *Big Vein Coal Company* case is not applicable.

Under the well established practice in Ohio, more than one attachment may be secured in the same action. Thus, property may be attached under one affidavit. Afterwards, another affidavit may be filed and other assets attached thereunder. It has never been necessary to commence a new action prior to judgment merely to attach additional assets. All that is necessary is that an action be pending at the time the attachment is secured. Ohio General Code Section 11823; and see *Pope vs.*



*Hibernia Insurance Co.*, 24 O. S. 481, *supra*; and *Leavitt vs. Rosenberg*, 83 O. S. 230, 240, *supra*.

If the attachment in the District Court would have been good had the case remained in the state court, it is good after removal. 28 U. S. C. A., Sec. 726 (R. S. Sec. 915) expressly provides that in common law causes in the District Courts the plaintiff shall be entitled to similar remedies, by attachment or other processes, against the property of the defendant, which are provided by the laws of the state in which such court is held.

The foregoing statute entitled the plaintiff in the case at bar to proceed in the same identical manner after removal as he could before. This is particularly clear since it has been held that upon removal the plaintiff will not be deprived of substantive rights and remedies afforded by the law of the state in which his action was originally commenced.

*Cain vs. Commercial Publishing Co.*, 232 U. S. 124, 34 S. Ct. 284, 58 L. Ed. 534;  
*Great Southern Insurance Co. vs. Burwell*,  
 (C. C. A. 5) 12 F. (2d) 244.

The rule is also settled that a case is removed to the Federal District Court upon the filing of a sufficient petition and bond therefor in the state court.

*Remington vs. Central Railway*, 198 U. S. 95, 25 S. Ct. 577, 49 L. Ed. 959;  
*Webb vs. Southern Railway*, 248 Fed. 618,  
 cert. denied 247 U. S. 578.

In Ohio an attachment may be secured "at or after" the commencement of the action (Ohio General Code Sec. 11819). Thus, under the rule laid down by the court be-

low, although an action might be commenced and pending, the defendant could prevent an attachment of his property by filing a petition and bond for removal although it could have been secured had the action remained in the state court. The same procedure could be repeated if a new suit were filed.

To secure an attachment "at" the commencement of the action would be difficult if not impossible, especially under the ruling of the court below that an attachment secured prior to the first publication of notice is premature and void.

And to require the filing of a new suit every time additional assets of a non-resident defendant are discovered would merely result in a multiplicity of actions with several suits pending on the same claim based on the same evidence but requiring separate trials.

This court has recently held that the law to be applied in any case is the law of the state as declared by its legislature in any statute or by its highest court. See: *Erie Railroad vs. Tompkins*, 304 U. S. 64, *supra*, and other cases cited *infra* at pages 15 and 16 holding that in actions involving attachments, the federal courts will apply and enforce such remedies, adopting and following the interpretations of the statutes by the highest court of the particular state.

It is well settled that where an action has been commenced in the state court and property seized under an order of attachment, the plaintiff after removal may take such steps as may be necessary to perfect the jurisdiction of the court. In *Clark vs. Wells*, 203 U. S. 164, *supra*, and in *Friedman Bros. Co. vs. Greaney*, 297 Fed. 478, *supra*, it was held that the plaintiff could perfect jurisdiction by publication of notice after removal.

The only prerequisite to taking such steps to perfect the jurisdiction of the court following removal is to have an action pending (Ohio General Code Sec. 11819), and the only question involved, therefore, is whether or not an action was pending in the federal court at the time the garnishment under the supplemental affidavit was secured. Under the provision of Ohio General Code Section 11279, an action was pending, whether the attachments in the state court were valid or not.

In *Freeman vs. Alderson*, 119 U. S. 185, this court says, at page 187:

"There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted."

In such an action, the right to secure an attachment may be dependent upon the continuance of the main action. But the main action is not dependent upon the validity of any particular attachment. An action might be pending which could not proceed to judgment until a valid attachment had been secured. But this does not mean that the action must necessarily fail because an attachment secured in that action proves to be invalid. On the contrary, the plaintiff may file a new affidavit and secure an attachment thereunder, and the court thereupon has jurisdiction to proceed in the action and render judgment up to an amount which can be satisfied out of the property attached.

This does not mean, however, that a court does not have control over its docket. Thus, if the plaintiff in an

action of this kind does not desire further opportunity to secure an attachment or service of process on the defendant, the court very properly may order the petition stricken. It is only because of the control which the court exercises over its docket, however, that such an action may be stricken, and not because of the invalidity of any particular attachment.

The removal statutes were not enacted by Congress to introduce confusion into the law or to deprive a litigant of remedies provided by a state through the use of highly technical rules. They were enacted, on the other hand, for the purpose of providing an impartial forum for a non-resident, and in such actions as the one at bar, the plaintiff should be permitted to take such steps to perfect the jurisdiction of the court as he would had the case remained in the state court.

### CONCLUSION

Because of the questions presented, this case is of such wide general interest that this court should exercise its supervisory powers to eliminate the obvious conflict between the decision of the court below with the decisions of the Supreme Court of Ohio and prior decisions of this court, so that the law may be authoritatively defined and the erroneous result below corrected.

We respectfully submit that the attachments secured in this action can be and ought to be sustained independently of each other and that if this cause is reviewed by this court, it should result in an order reversing the court below by (1) sustaining the attachments secured in the state court; (2) sustaining the attachment secured

in the District Court after removal, and by remanding the cause to the District Court for further proceedings in accordance with law.

Respectfully submitted,

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**CHARLES ELMORE CRUMLEY**  
**CLERK**

**IN THE  
Supreme Court of the United States**

**October Term, 1939**

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**No. 676**

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**HORTON C. RORICK,**

*Petitioner,*

**vs.**

**DEVON SYNDICATE, LIMITED, A CANADIAN  
CORPORATION,**

*Respondent.*

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**On Certiorari from United States Circuit Court of  
Appeals, Sixth Circuit**

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**PETITIONER'S BRIEF ON THE MERITS**

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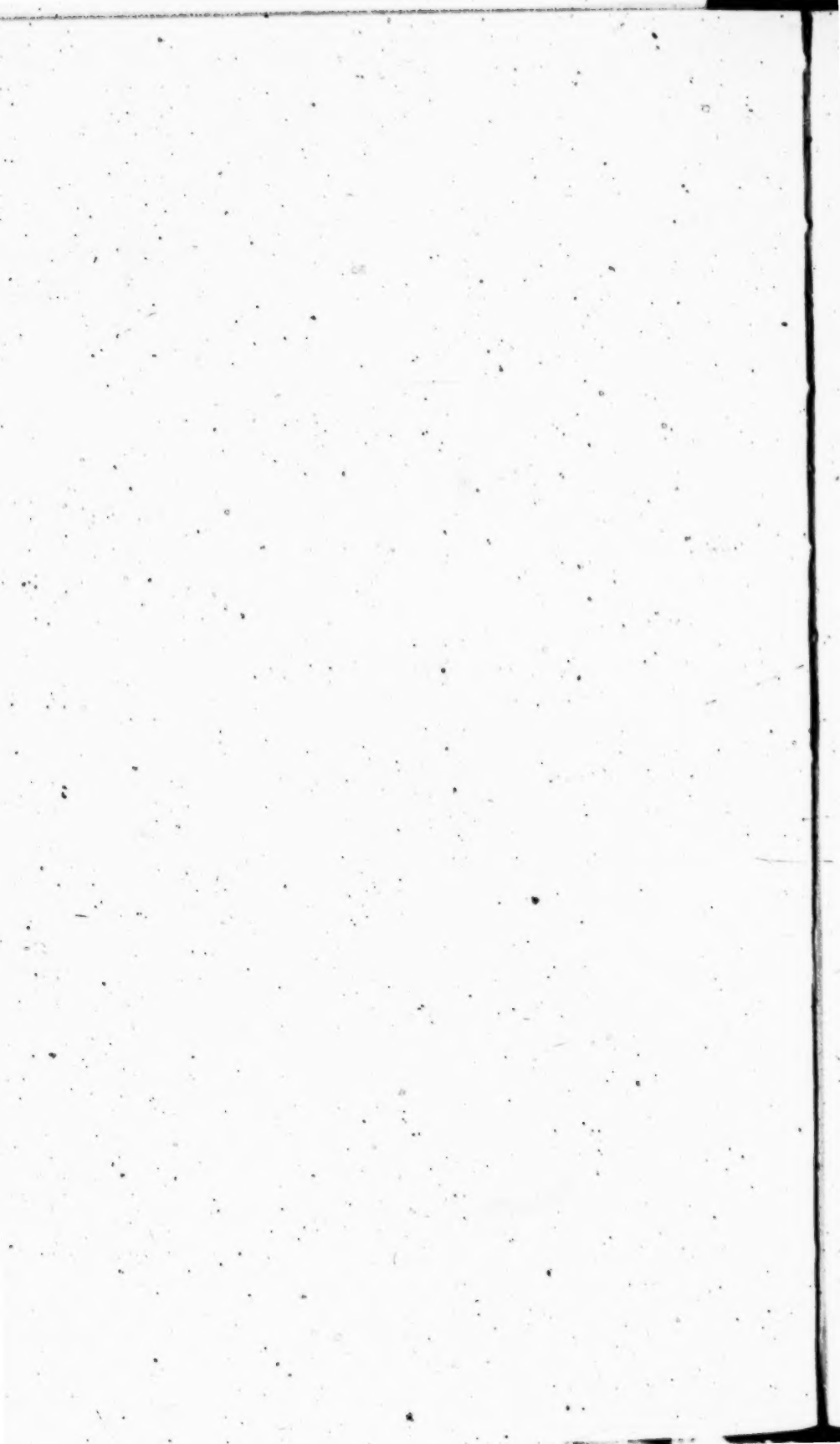
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**IN THE**  
**Supreme Court of the United States**

October Term, 1939

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No. 676

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HORTON C. RORICK,

*Petitioner,*

*vs.*

DEVON SYNDICATE, LIMITED, A CANADIAN  
CORPORATION,

*Respondent.*

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**PETITIONER'S BRIEF ON THE MERITS**

---

*To the Honorable the Supreme Court  
of the United States:*

Your petitioner respectfully shows:

**I. STATEMENT OF CASE**

On January 19, 1930, the petitioner, a resident of Toledo, Ohio, filed suit in the Common Pleas Court of Lucas County, Ohio, against the respondent, a non-resi-



dent corporation, on a claim for Four Hundred Thousand Dollars (\$400,000) with interest, under a written contract. Summons was immediately issued for the defendants (R. 2). An affidavit in attachment and garnishment was filed with the petition and orders of attachment and garnishment were issued and served pursuant thereto (R. 6).

On June 27, 1930, a second affidavit was filed describing other property of respondent and orders of attachment and garnishment were issued and served pursuant thereto (R. 12).

On October 10, 1930, an affidavit for constructive service was filed and service by publication commenced (R. 15).

On December 5, 1930, the respondent appeared specially and removed the case to the District Court (R. 18).

On January 15, 1931, The Spitzer Rorick Trust & Savings Bank filed its answer as garnishee, stating that it was indebted to the respondent on two special deposit accounts in the amounts of \$9,255.95 and \$20,258.42, respectively (R. 25).

On January 26, 1931, the respondent still appearing specially, moved the District Court for an order quashing and discharging the attachments (R. 26).

On February 17, 1936, before any disposition of the foregoing motion, and with leave of court (R. 28), petitioner filed a supplemental and amended petition (R. 29), together with a supplemental affidavit in garnishment (R. 33). The amended petition is identical to the original in all respects material to this appeal. The supple-

mental affidavit in garnishment, however, described in addition certain property of the respondent not previously attached.

On April 11, 1936, the respondent again appeared specially and moved the District Court for an order discharging the attachment and garnishment secured under the supplemental affidavit (R. 43).

On April 22, 1936, The Spitzer Rorick Trust & Savings Bank filed a supplemental answer as garnishee, reporting that it was holding the further sum of \$17,576.08 pursuant to the attachment under the affidavit filed in the District Court (R. 44).

The District Court held that the affidavits in attachment and garnishment filed in the state court were void, because they were acknowledged before a notary public, who, in the court's opinion, was disqualified; that they could not be amended or validated by any proceedings in the District Court after removal. Said court further held that the attachment under the affidavit filed in the District Court could not be sustained without personal service, and thereupon discharged the attachments, quashed the summons and struck the petition and amended and supplemental petition from the files (R. 47).

On appeal, the Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court on the specific ground that the attachments and garnishments in the state court, prior to removal, were premature and void because they were secured prior to the first publication of notice, and that an attachment could not be secured under an affidavit filed after removal without personal service (R. 94).

## II. OPINIONS BELOW

The opinion of the District Court is found at page 47, *et seq.* of the record, and the opinion of the Circuit Court at page 94, *et seq.* The latter opinion is reported in 100 F. 2d 844.

## III. JURISDICTION

The date of the judgment to be reviewed is January 11, 1939 (R. 93), and is reviewable under Section 240(a) of the Judicial Code (U. S. Code, Title 28, Sec. 347), as amended by the Act of Congress approved February 13, 1925, C. 229, Sec. 1, 43 Stat. 938.

## IV. ISSUES

There are three main issues on this appeal:

1. Under Ohio law, is an attachment premature and void which is secured after the filing of a petition and issuance of summons, but prior to the first publication of notice?
2. Where the defendant in a pending action appears specially, and voluntarily removes the case from a state court in Ohio to a Federal District Court, may the plaintiff secure an attachment after removal in conformity to Ohio law?
3. Was Dennis W. Drennan incompetent to act as notary public on the affidavits in attachment filed in the state court?

On the foregoing issues, the petitioner will support the following propositions:

1. Under Ohio law, an attachment secured after the filing of a petition and the issuance of summons, but prior to the first publication of notice is not premature and void.

2. An attachment may be secured in conformity to Ohio law after the action has been removed to the federal court by the defendant.

3. Dennis W. Brennan was competent to act as the notary public on the affidavits filed in the state court.

## V. ARGUMENT

### 1. UNDER OHIO LAW AN ATTACHMENT SECURED AFTER A PETITION IS FILED AND SUMMONS ISSUED, BUT PRIOR TO THE FIRST PUBLICATION OF NOTICE, IS NOT PREMATURE AND VOID

**In Ohio an Action Is Commenced by Filing a Petition and Causing Summons to Issue. An Attachment Can Be Secured at or After the Commencement of the Action. No Time Is Set by Statute Within Which Publication Must Be Begun.**

The court below squarely held that in Ohio an attachment secured after the filing of a petition and the issuance of summons, but prior to the first publication of notice was premature and void.

In the report of the decision of the court below in 100 F. 2d 844, the second paragraph of the syllabus is as follows:

**"In Ohio, an attachment issuing before personal service is obtained, or before the beginning of the publication for substituted service, is premature and void. Gen. Code Ohio, Sec. 11292."**

This holding is directly in conflict with the following decisions of the Supreme Court of Ohio and other courts in that state.

Bacher vs. Shawhan, 41 O. S. 271;  
 Seibert vs. Switzer, 35 O. S. 661;  
 Lessee of Paine vs. Mooreland, 15 Oh. 435;  
 St. John vs. Parsons, 54 Oh. App. 420, 8  
 Oh. Op. 169, 23 Ohio Abs. 432;  
 Citizens National Bank vs. Union Central  
 Insurance Co. 12 Oh. C. C. (N.S.) 401;  
 Royal Indemnity Co. vs. Agrios, 7 Oh. Op.  
 272, 22 Oh. Abs. 312;  
 Central Savings Bank vs. Langenbach et al.,  
 1 Oh. N. P. 124.  
 See 4 Oh. Jur. 68, Sec. 44.

In *Bacher vs. Shawhan*, 41 O. S. 271, *supra*, the facts are stated in the syllabus which follows:

"1. In an action where property is attached and summons returned 'not served,' no time is fixed by statute within which service by publication must be made.

"2. Hence: Where the service by publication was not completed until eight months after the return of summons, it is error to dismiss the action for an alleged want of jurisdiction by reason of such delay."

And in *Seibert vs. Switzer*, 35 O. S. 661, *supra*, there is the following syllabus:

"1. An attachment under the civil code, is an auxiliary proceeding in an action, which may be sued out by the plaintiff, at or after the commencement of such action, by filing a petition and causing a summons to issue thereon.

"2. About 11 o'clock A.M., an order of attachment was issued upon the filing of an affidavit and giving bond. It was served and returned about 3 o'clock P.M., but no petition was filed until about

6 o'clock P.M. of the same day. *Held*, that the attachment was issued without authority of law, and as against other attaching creditors and lien holders gave no priority."

At page 665, the court said:

"An action is commenced or brought, within the meaning of Sections 192 and 193, by the filing of a petition and causing a summons to issue thereon, Code, Sec. 55. Until then there is no action in which an attachment can issue."

In *St. John vs. Parsons*, 54 Oh. App. 420, *supra*, a petition was filed and summons issued which was later returned "Not found." An affidavit was filed with the petition and an attachment levied on real estate before service by publication was begun. The language quoted below appears at page 422 of the report:

"The order of attachment will not be set aside because issued before the service by publication was begun."

There is the following paragraph in the syllabus in *Citizens Bank vs. Union Central Life Insurance Co.*, 12 Oh. C. C. (N.S.) 401, *supra*:

"3. An action has been begun under the attachment law when the petition has been filed and summons issued thereon, and the order of attachment will not be set aside because issued before the service by publication was begun."

The syllabus in *Royal Indemnity Co. vs. Agrios*, 7 Oh. Op. 272, *supra*, follows:

"1. An attachment may issue immediately upon the filing of the petition or any time thereafter, if grounds therefor exist so long as the petition is *bona fide* and the steps required to complete the commencement of the action are followed with due diligence."



And in *The Central Savings Bank vs. Langenbach*, 1 Oh. N. P. 124, *supra*, there is the following syllabus:

"1. In an action where property is attached, and summons returned 'not served,' and the defendant is brought in by publication, made eight months after the return of summons, the lien of the attachment thus created will be superior to the liens of attachments issued and levied on the same property after the commencement of such action, and before said publication was made.

"2. An action is not commenced alone by filing a petition and an affidavit for publication, and making publication, but *a summons must be issued* whether service can be had only by publication or not.

"3. Property seized under an order of attachment issued in a case where no summons was issued, creates no valid lien on the property as against other lien holders."

The Ohio rule is stated in *Fol. 4, Oh. Jur. 68, Sec. 44*, as follows:

"An attachment issued after the filing of the petition and after the issuance of the summons, is issued at or after the commencement of the action within the meaning of the statute. An attachment issued with the summons after the petition is filed, is issued at the commencement of the action."

The procedural details for securing an attachment in Ohio have been well settled, since the decision by the Supreme Court of Ohio in *Lessee of Paine vs. Mooreland*, (1846) 15 Oh. 435, *supra*, where it was expressly held under the same or similar statutes that a court acquired jurisdiction in attachment by the issuing of process, predicated upon a petition, and the attaching of property under a requisite affidavit.

*Ohio General Code*, Sec. 11279, provides:

"A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

(considered and discussed in *Bazell vs. Belcher* 31 O.S. 572 and

*Ohio General Code*, Sec. 11819, provides, so far as material: *Burton vs Ins. Co.*  
26 O.S. 41

"In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:" (Grounds omitted.)

The court below relies upon its decision in *Doherty vs. Cremering et al.*, 83 F. (2d) 388, and upon *Seibert vs. Switzer*, 35 O. S. 661, *supra*.

In the *Seibert* case no petition had been filed nor any summons issued when the attachment was secured, and in *Henrietta Mining & Milling Co. vs. Gardner*, 173 U. S. 123, also relied upon, the judgment below was attacked on the ground that "the attachment was void because the writ was issued before the issuance of summons."

With all due respect, it is submitted that the holding and the language in *Doherty vs. Cremering* is utterly incomprehensible. The court states that a petition was filed in the Common Pleas Court against a non-resident defendant, and that service was attempted "by leaving a copy of the petition at his usual place of business in Cincinnati" which service the court properly held was invalid.

It appears, however, that following removal the federal court "quashed the service of summons." Nothing is said as to whether or not summons was issued and

if so, when. Upon these partial and confusing facts the court then purports to follow the rule announced in *Seibert vs. Switzer*, 35 O. S. 661, *supra*, on the theory that it was not overruled by *Bacher vs. Shawhan*, 41 O. S. 271, *supra*. Obviously, the *Shawhan* case does not overrule the *Seibert* case because the facts are entirely different and the legal principles announced are entirely consistent. But it is an inexplicable mystery how the Circuit Court could find support in the *Seibert* case for its decision in the *Doherty vs. Cremering* case, or in its decision in this case. The case of *Seibert vs. Switzer* holds that an attachment may be secured at any time after the filing of a petition and issuance of summons.

In spite of the fact that summons was issued at the time the petition was filed in the case at bar, bringing it within the provisions of Ohio General Code Sections 11279 and 11819, quoted *supra*, the Circuit Court below has held that Ohio General Code Section 11230 is controlling. This section is quoted below:

"An action shall be deemed to be commenced *within the meaning of this chapter*, as to each defendant, at the date of the summons which is served on him or on a co-defendant who is a joint contractor, or otherwise united in interest with him. When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication, if it be regularly made." (Italics ours.)

Ohio General Code Section 11231 follows:

"*Within the meaning of this chapter*, an attempt to commence an action shall be deemed to be equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt be followed by service within sixty days." (Italics ours.)

Construing Ohio General Code Section 11231, the Supreme Court of Ohio in *Bacher vs. Shawhan*, 41 O. S. 271, *supra*, uses the following language at page 272:

"It will be observed that the restrictive words 'within the meaning of this chapter' confine the operation of this section to matters concerning the limitation of actions."

See 1 Ohio Juris. 336 Sec. 25 for complete discussion of the commencement of actions in Ohio.

Both sections of the Code quoted above are in the chapter on "Limitations of Actions," and the same reasoning applies equally to Section 11230.

It should be noted that Judge Allen in the footnote to her opinion in *Doherty vs. Cremering*, *supra*, only quotes the last sentence of Ohio General Code, Section 11230, omitting the sentence containing the restrictive words "within the meaning of this chapter."

In *Royal Indemnity Company vs. Agrios*, 7 Oh. Op. 272, the court clearly analyzes the Ohio statutes, and holds that Ohio General Code Section 11230 has no application where a petition had been filed and summons issued.

In *Bear vs. Old Tyme Distilleries*, 5 Oh. Op. 530, relied on by the respondent in the lower courts, the court expressly says "no summons was issued in this case." It is, therefore, not in point and is referred to here because it was the only case in Ohio cited by opposing counsel in the Circuit Court below.

On principle, the decision of the Circuit Court is obviously wrong. The statutes of Ohio providing for attachments involving non-resident defendants were the same in all material respects in 1853 as they are today.

See: Swan & Critchfield; Revised Statutes of Ohio (in force August 1, 1860), Vol 2, page 1002;

4 Oh. Jur. 16, Sec. 3.

Clearly the legislature never intended to require publication before an attachment. In 1853 such a requirement would have prevented a successful attachment, because there were few, if any, daily newspapers. Even under present conditions the necessity of securing an attachment and publication on the same day would be extremely difficult, if not impossible, and the absurdity of such a requirement should be self-evident.

However, under the rule announced by the court below, the publication must precede the attachment. If this were true, there usually wouldn't be any property thereafter to attach because the defendant would remove the property from the court's jurisdiction. In 1853 it might have been necessary to wait a week or more before any publication could be made.

On theory, the very purpose of publication is to notify the defendant that his property has been attached in a pending action, and that the court has acquired jurisdiction, not over the person of the defendant, but over his property, and that unless an answer is filed by a certain time a judgment will be entered which can and will be satisfied out of the property attached. A judgment in excess of the value of the property attached would be without effect as to such excess. 6 C. J. 90, Sec. 125. It is only the combination of an attachment and a pending action that gives a court jurisdiction to enter a judgment.

In this type of case the action is *quasi in rem*. In *Freeman vs. Alderson*, 119 U. S. 185, this court says at page 187:

"There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted."

It is obvious that the courts below utterly misconstrued the nature of this action and the purpose of publication under the Ohio Statutes. See also: *Pennington vs. Fourth Bank*, 243 U. S. 269, 61 L. Ed. 713, 37 S. C. 282. It is also obvious that the courts below failed to follow the decisions of the Ohio Supreme Court expressly holding that an attachment may be secured "at or after" the commencement of an action, that an action is commenced by "filing a petition" and "causing summons to be issued thereon," and that no time is set by statute within which publication must be commenced.

#### (a) DECISIONS OF THE OHIO SUPREME COURT ARE CONTROLLING

In spite of the well established rule in Ohio that an attachment may be secured after the filing of a petition and the issuance of summons, although prior to the first publication of notice, the court below held that such an attachment is premature and void.

28 U. S. C. A., Sec. 724 (R. S. Sec. 914), provides:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform as near as may be, to the practice, pleadings,



and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such district courts are held, any rule of court to the contrary notwithstanding."

The rule is now well settled that except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state as declared by its legislature in a statute or by its highest court.

Erie Railroad vs. Tompkins, 304 U. S. 64,  
82 L. Ed. 1188, 58 Sup. Ct. 817.

Applying the foregoing rule, it has been repeatedly held in actions involving attachments authorized by the statutes of a state, that the federal courts apply and enforce such remedies, adopting and following the interpretation of the statutes by the highest court of the state.

Loewe vs. Savings Bank, 236 Fed. 444, aff'd  
242 U. S. 357;

Perez vs. Fernandez, 202 U. S. 80, 50 L. Ed.  
942; 26 Sup. Ct. 561;

Fleitas vs. Cockren, 101 U. S. 301, 25 L.  
Ed. 954;

Beach vs. Viles, 27 U. S. 675, 2 Peters 675;

LaVarre vs. International Paper Co., (D.  
C., S. C.) 37 F. (2d) 141;

Wheeling Traction vs. Pennsylvania Co., (D.  
C., Ohio) 1 F. (2d) 478;

Pere Marquette Railway vs. Western Dis-  
patch, (D. C., Mich.) 284 F. 574.

It follows that the courts below are bound by the decisions of the Ohio Supreme Court in *Bacher vs.*

*Shawhan*, 41 O. S. 271, *supra*, and *Seibert vs. Switzer*, 35 O. S. 661, *supra*, and should have followed the rule laid down in those cases that an attachment after the filing of a petition and the issuance of summons is not premature, although before publication of notice.

**(b) THE DECISION BELOW CONFLICTS WITH  
PREVIOUS DECISION OF THIS COURT**

This court has held that where an action has been commenced in the state court and property attached, the plaintiff, after removal, may complete service by publication, or if not commenced, the plaintiff can commence publication.

Clark vs. Wells, 203 U. S. 164, 172, 51 L. Ed. 138, 27 Sup. Ct. 43.

In so ruling, this court necessarily held that an attachment secured after the commencement of the action, but prior to publication, was not premature and void and it has been likewise so held in the case of *Friedman Brothers Co. vs. Greaney*, (D. C., N. Y.) 297 Fed. 478.

The syllabus in *Friedman Brothers Co. vs. Greaney*, *supra*, follows:

"Under Rev. St. No. 914 (Comp. St. No. 1537), and Judicial Code, No. 36 (Comp. St. Nos. 1018, 1020), making the state practice applicable to attachments commenced in the state court, on removal of cause to a federal court, it is permissible in an action commenced in a state court by attachment and removed to a federal court, whether necessary or not, to bring in a defendant by order of publication as against a contention that an order of publication would be void as the commencement of a suit by attachment."

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See also:

Purdy vs. Wallace Moore & Co., (C. C., Mass.) 81 Fed. 513.

## 2. AN ATTACHMENT MAY BE SECURED IN CONFORMITY WITH OHIO LAW AFTER THE DEFENDANT HAS REMOVED THE ACTION TO THE FEDERAL COURT

If the Case Had Remained in the State Court Other Affidavits Could Have Been Filed and Orders of Attachment Issued Pursuant Thereto Prior to Judgment, Attaching Other Property of the Defendant. 28 U. S. C. A., Section 726 (R. S., Section 915) Preserves This Right After Removal.

As previously shown, the Circuit Court erred in holding that the attachments secured in the state court prior to removal were premature and void because secured prior to the first publication of notice.

Having erroneously so held, however, said court proceeded to err further in holding that the attachment secured under the affidavit filed in the District Court after removal was invalid because the defendant could not be personally served.

Both courts below principally relied upon the decision of this court in *Big Vein Coal Co. vs. Read*, 229 U. S. 31, 33 S. Ct. 694, 57 L. Ed. 1053.

That case, however, was commenced in a federal court, whereas the case at bar was begun in a state court and thereafter removed by the defendant to the federal court. For this reason entirely different considerations and principles are involved, and the rule laid down in the *Coal Company* case is not applicable.

In the *Coal Company* case the plaintiff selected his own forum. On the other hand, in the case at bar the plaintiff commenced his action in a state court under the Ohio statutes, and it was the defendant who thereafter appeared specially and voluntarily removed the case to the federal court.

In short, can a defendant in an action commenced in a state court deprive the plaintiff therein of the attachment remedies provided by the Ohio statutes by the simple procedure of removing the case to the federal court?

An examination of Ohio procedure and relevant federal statutes clearly shows that the plaintiff cannot be deprived of such remedies, and reveals the incongruity of the position of the lower courts.

Under the well established practice in Ohio more than one attachment may be secured in the same action. Thus property may be attached under one affidavit. Afterwards, another affidavit may be filed and other assets attached thereunder. It is not necessary to commence a new action prior to judgment merely to attach additional assets, as this would result in a multiplicity of actions with several suits pending on the same claim, based on the same evidence, but requiring separate trials. Ohio General Code, Section 11820, merely provides that an order of attachment shall be made when there is an affidavit filed setting up certain requisite grounds.

Even where an attachment is ineffective and void because of a fatally defective affidavit, a new affidavit under Ohio law could be filed and an attachment secured under such affidavit, or the defective affidavit could be amended and a new attachment filed under the original

affidavits, properly amended. It is not necessary to commence a new action.

Leavitt vs. Rosenberg, 83 O. S. 230, 235;

Pope et al. vs. Hibernia Insurance Co., 24 O. S. 481.

In *Leavitt vs. Rosenberg*, 83 O. S. 230, *supra*, the Supreme Court says at page 235:

"The plaintiff did not ask the privilege of filing a new perfect affidavit with a view of issuing a new writ of attachment. *That he had an undoubted right to do* and the court did not refuse him such privilege. Indeed, he could have filed such an affidavit without applying to the court for leave." (Italics ours.)

And in *Pope vs. Hibernia Insurance Company*, 24 O. S. 481, *supra*, there is the following paragraph of the syllabus:

"Jurisdiction cannot be acquired in such case, by amendment of the petition and affidavit, showing a cause of action arising upon contract, *without the issuance of an attachment after the amendment.*" (Italics ours.)

The state procedure, however, must be considered in connection with federal statutes and precedent.

It is a settled law that in a proper case the defendant may remove a case begun in a state court to a federal court, and that by virtue of the removal, the federal court becomes possessed of the action with all the rights and powers respecting the cause of action and the parties thereto as the state court would have possessed.

Goldey vs. Morning News, 156 U. S. 518,  
15 S. Ct. 559, 39 L. Ed. 517;

Clark vs. Wells, 203 U. S. 164, 27 S. Ct. 43,  
51 L. Ed. 138, *supra*.



The rule is also settled that a case is removed to the Federal District Court upon the filing of a sufficient petition and bond therefor in the state court.

Remington vs. Central Railway, 198 U. S.  
95, 25 S. Ct. 577, 49 L. Ed. 959;

Webb vs. Southern Railway, 248 Fed. 618,  
cert. denied 247 U. S. 578.

Under the foregoing rules the defendant may remove the action whether the plaintiff likes it or not, and the action is removed merely upon the filing of a sufficient petition and bond therefor in the state court. Thus, the defendant could prevent a subsequent attachment of his property in the action by filing a petition and bond for removal, although it could have been secured had the action remained in the state court. The right to file a new suit would offer no solution since the same procedure could be repeated. Under the rules laid down in the Circuit Court below the defendant could prevent the plaintiff from ever securing an attachment in any action, because a plaintiff would have to file suit, publish, and then attach.

When Congress enacted the following statutes it obviously never intended that any such incongruous situation should exist.

28 U. S. C. A., Sec. 724 (R. S., Sec. 914):

“The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such district courts are held, any rule of court to the contrary notwithstanding.”

28 U. S. C. A., Sec. 726 (R. S., Sec. 915):

"In common law causes in the district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process. Similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy."

At all times referred to in this action the following rule of the United States District Court for the Northern District of Ohio was in full force and effect:

"Rule 5(2): As authorized by Section 915 of the Revised Statutes (U. S. Code, Title 28, Sec. 726), the court adopts in law cases all laws of the State of Ohio now in force in relation to attachments, and other process, subject to the proviso contained in said section."

28 U. S. C. A., Sec. 79 (R. S., Sec. 646):

"When any suit shall be removed from a state court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. • • •"

The Circuit Court below reasoned that since neither this Honorable Court, nor any other Circuit Court of Ap-

peals, had construed the foregoing statutes to permit it, an attachment could not be secured after removal.

Both courts below cite *Cleveland & Western Coal Co. vs. J. H. Hillman & Sons*, (D. C., Ohio) 245 Fed. 200. In that case an action was commenced in the state court and an attachment secured. After removal, the attachment was discharged because the affidavit filed in the state court was defective. Thereafter a totally new affidavit was filed and an attachment secured which was then discharged on the theory that it amounted to the commencement of an action in the federal court without personal service of summons.

The *Hillman* case must be distinguished from the case at bar (1) because the attachments prior to removal in the case at bar are entirely regular and valid, whereas in the *Hillman* case the attachment was conceded to be a nullity; (2) the original attachment had been quashed before the second one had been secured in the *Hillman* case, whereas the attachment in the federal court in the case at bar was secured before any disposition had been made of the original attachment; and (3) the proceedings in the *Hillman* case following removal were not and did not purport to amend any proceedings taken in the state court. The effect of such an amendment is hereinafter discussed at page 39 *et seq.*

However, the decision in the *Hillman* case is incorrect. Judge Westenhaver, the district judge who decided the case, fell into error when he concluded that no action was pending after the discharge of the attachment secured in the state court. He says at page 203:

"Under the Ohio law, an action is pending, so as to stop the running of the statute of limitation, from the time process is issued, only when actual

service is made within sixty days thereafter. G. C. Secs. 11230, 11231. An attachment can be issued only at or after the commencement of an action, G. C. Secs. 11279, 11280. All of the steps indicated by these sections as necessary to give a plaintiff the status of one having an action pending in court would of necessity have to be taken after the order discharging the attachment, if, as in the present case, the attachment were discharged for want of a sufficient affidavit."

Although Judge Westenhaver purported to apply the Ohio law, his conclusion is directly in conflict with the decisions of the Ohio Supreme Court in *Leavitt vs. Rosenberg*, 83 O. S. 320, *supra*, and *Pope et al. vs. Hibernia Insurance Co.*, 24 O. S. 481, *supra*. In the former case the court says at page 235:

"The plaintiff did not ask the privilege of filing a new perfect affidavit, with a view of issuing a new writ of attachment. *That he had an undoubted right to do.* \* \* \* \* Indeed, he could have filed such an affidavit without applying to the court for leave."

And in *Pope et al. vs. Hibernia Insurance Company*, 24 O. S. 481, *supra*, there is the following paragraph of the syllabus:

"Jurisdiction cannot be acquired in such case, by amendment of the petition and affidavit, showing a cause of action arising upon contract, *without the issuance of an attachment after the amendment.*"

Thus, in both of the foregoing cases the court held that after the discharge of an attachment because of a defective affidavit the plaintiff could have filed a new and perfect affidavit and proceeded to secure an attach-

ment in the same action, and hence, that the discharge of the attachment did not automatically carry with it the dismissal of the entire action. These cases are both entirely sound on principle and are consistent with the theory of an action *quasi in rem* and the attachment statutes of the State of Ohio.

We have previously shown (*supra*, p. 10 *et seq.*) that G. C. Sections 11230, 11231, referred to in the *Hillman* case; have no application where a petition has been filed and summons issued and are confined in operation to the chapter of the Code relating to limitation of actions. The reference to these sections, however, was undoubtedly the basis for their erroneous application in *Doherty vs. Cremering supra*, and in the case at bar.

There is no decision, so far as we have found, in Ohio, which is contrary to the well established rule as announced in *Leavitt vs. Rosenberg, supra*, and *Pope et al. vs. Hibernia Insurance Co., supra*. Because it was urged in the lower courts, however, we wish again to call the court's attention to the fact that in *Bear vs. Old Tyme Distilleries, Inc.*, 5 Oh. Op. 530, the Common Pleas Court expressly said: "no summons was issued in this case," and that the subsequent report in 6 Oh. Op. 253 is, therefore, misleading in so far as it indicates that the discharge of an attachment carries with it the dismissal of the entire suit.

It follows that even if the attachments secured in the state court prior to removal were void, which they are not, the attachment secured in the federal court following removal should nevertheless be sustained. The plaintiff had an action pending upon which to perfect the jurisdiction of the federal court by the attaching of prop-

erty of the defendant. As said before, it is a combination of a pending action and the attachment of assets pursuant thereto that creates jurisdiction. If plaintiff had a pending action the subsequent steps taken may follow to perfect the court's jurisdiction.

If the attachments in the state court are valid, as contended, the only question is whether or not the jurisdiction of the court can be extended over the additional assets attached. It is submitted that there is no logical reason why it should not be, and that a holding to the contrary would merely result in a multiplicity of actions and serve no useful purpose either from a practical or theoretical point of view.

### **3. DISTRICT COURT ERRED IN HOLDING NOTARY PUBLIC ON AFFIDAVITS FILED IN STATE COURT DISQUALIFIED**

#### **Notary Had No "Legal, Material, Pecuniary and Immediate" Interest in This Litigation**

The District Court held that the notary public on the affidavits filed in the state court was disqualified because he had been an employe of a partnership of which the plaintiff (petitioner) was a member and subsequently of a corporation of which the petitioner was the president.

In so holding the trial court clearly erred. The claim was an individual and not a partnership or corporation claim and the notary had no other connection with the case whatsoever (R. 61).

The applicable statutes of Ohio in effect when the affidavits in question were acknowledged, are quoted below:



## General Code Sec. 11523:

"An affidavit may be used to verify a pleading, to prove the service of summons, notice or other process in an action, or to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law."

## General Code Sec. 11524:

"An affidavit may be made in or out of this state before any person authorized to take depositions, and unless it is a verification of a pleading, must be authenticated in the same way as a deposition."

## General Code Sec. 11532:

"The officers before whom depositions are taken must not be a relative or attorney of either party or otherwise interested in the event of the action or proceeding."

The Circuit Court did not find it necessary to pass upon the point but stated that there was "persuasion" in the argument that said notary was *not* disqualified, (1) because he was not an attorney in the case, and (2) because to be "otherwise interested" in the case under the Ohio statute (G. C. Sec. 11532) the interest must be some "legal, material and immediate interest" in the controversy. The Circuit Court indicated the proper rule and the trial court clearly was in error.

Bevan vs. Krieger, 289 U. S. 459, 77 L. Ed. 1316, 53 Sup. Ct. 661;

Tumey vs. Ohio, 273 U. S. 510, 523, 71 L. Ed. 749, 47 Sup. Ct. 437;

Rhinelanders vs. Pittsburgh Co., 15 Oh. C. C. (N.S.) 286.

In *Rhinelanders Company vs. Pittsburgh Company*, 15 Oh. C. C. (N.S.) 286, *supra*, the court says:

"The notarial officer before whom this affidavit was sworn to was not a relative or attorney of either party, nor does the record show that he was 'otherwise interested in the event of the action or proceeding.' He was a young man working on a salary for a firm of attorneys in the case. The interest in the event of the action or proceeding which disqualified a notary public from acting in the taking of affidavits, we hold to be some legal, certain and immediate interest such as formerly disqualified a witness from testifying. See *Smith vs. The State*, 18 Ohio 89."

The testimony of the notary is brief (R. 61-64). He testified that he is an attorney at law and a notary public. He neither prepared any paper filed in this action nor was consulted at any time in regard thereto. He is not an attorney of record in the case, nor associated with any attorney of record. He had no independent recollection of having acted as notary on the affidavits in question, but identified his signature. The plaintiff (petitioner) had never employed him as personal counsel and he had no interest in the case in any way, shape or form, financially or otherwise, either before its inception or since. He is not related to the plaintiff. His only connection with the plaintiff was his association with a municipal bond house of which the plaintiff was a partner. He had continued in the employ of this partnership until its dissolution and thereafter was employed by a corporation of which the plaintiff (petitioner) was president.

It was argued in the courts below that the notary public was disqualified under the provisions of General Code Section 121. This section provides in substance

that no banker, broker or clerk of a bank, banker or broker shall be competent to act as a notary public in any matter in which such bank, banker or broker is interested. (Appendix A.)

The argument based upon this statute is novel and astute. Plaintiff's petition filed in the state court sets forth a cause of action for personal services rendered the defendant under a written contract. It has no connection whatsoever with the purchase or sale of securities or anything else by the plaintiff for his own account or that of anyone else, and has absolutely no connection with any bank or brokerage firm.

The Attorney General of Ohio was of the opinion that the word "broker" used in General Code Section 121 related only to a broker doing a banking business. 1928 O. A. G. No. 2044. Likewise, the section could apply only to a banker while acting for some bank, and petitioner was not an individual money lender, if the term "banker" is to be used so loosely. Plaintiff's action, on the other hand, is an entirely personal matter which was not done for or on behalf of any bank and was in no way connected with the banking business, and this section of the Ohio Code obviously has no application.

The uniform rule in the United States is that an attachment affidavit, improperly acknowledged, is not a nullity and may be amended by swearing to it before another notary. It is not necessary thereafter to secure any further service of the order of attachment.

Ramsey Motor Co. vs. Wilson, (Wyo.) 30 P.  
(2d) 482, 91 A. L. R. 908;

Sweringen vs. Howser, 37 Kan. 126, 14 P.  
436;

Frenzer vs. Phillips, 67 Neb. 229, 77 N. W. 668;

Heidelberger vs. Heidelberger, 196 App. Div. 626, 187 N. Y. S. 864.

In *Ramsey Motor Co. vs. Wilson*, 91 A. L. R. 908, *supra*, there is the following paragraph of the syllabus:

"An attachment affidavit sworn to before a notary who, being attorney for plaintiff, was incompetent to administer the oath to the affiant, is not a nullity, but merely voidable, and hence may, with the leave of the court, be amended by swearing to it before another notary."

28 U. S. C. A., Sec. 777 (R. S. 954), provides, so far as material:

"No summons . . . or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form, . . . and such court shall amend every such defect and want of form. . . ."

Thus, even if the affidavit was improperly notarized, which it was not, the affidavit filed in the federal court had the effect of an amendment and rendered the attachment under the original affidavit valid *ab initio*.

#### **4. THE AFFIDAVITS FILED IN THE STATE COURT AND PROCEEDINGS THEREUNDER WERE ENTIRELY LEGAL AND PROPER**

##### **(a) Attachment Statutes in Ohio Are to Be Liberally Construed**

Because of the highly technical character of the criticisms of the proceedings in the state court hereinafter discussed, it should be clearly noted that in Ohio

the attachment statutes and all proceedings thereunder are remedial in nature and to be liberally construed in order to achieve justice between the parties.

General Code, Sec. 10214;

Hart vs. Andrews, 103 O. S. 218, 132 N. E. 846;

Weirick et al. vs. Mansfield Lumber Co., 96 O. S. 386, 117 N. E. 362;

Bridge vs. Ring, 25 Oh. App. 149, 157 N. E. 496.

In *Weirick vs. The Mansfield Lumber Company*, 96 O. S. 386, *supra*, the syllabus follows:

"1. Remedial statutes require a liberal construction and a liberal application to the facts of any given case.

"2. Statutes pertaining to attachment and the *procedure* incident thereto are of a remedial nature.

"3. To reinforce this general rule the general assembly of Ohio has specially enacted Section 10214, General Code, providing that 'The provisions of part third and all proceedings under it, shall be liberally construed, in order to promote its object, and assist the parties in obtaining justice.' Thereafter the general assembly made all the statutes pertaining to *attachment* a part of such 'part third'."

In *Hart vs. Andrews*, 103 O. S. 218, *supra*, there is the following paragraph in the syllabus:

"Attachment proceedings being remedial in their nature, should be liberally construed, and Section 10214, General Code, expressly provides that they shall be liberally construed in order to do justice between the parties. (*Weirick vs. Mansfield Lumber Co.*, 96 Ohio St. 386, approved and followed.)"

In *Bridge vs. Ring*, 25 Oh. App. 149, *supra*, the first paragraph of the syllabus is quoted below:

"Under Section 10214, General Code, all proceedings relating to attachment must be liberally construed to promote objects of law and assist parties in obtaining justice."

**(b) AFFIDAVITS FILED IN THE STATE COURT WERE NOT DEFECTIVE BECAUSE THE WORDS "DOES BELIEVE" WERE OMITTED**

**An Affidavit in Attachment Need Not Recite the Identical Language of the Statute. Words of Substantially the Same Meaning Are Sufficient, Since Such Statutes in Ohio Must Be Liberally Construed.**

It was urged below that the affidavits filed in the state court were defective in failing to state that the affiant "does believe" and that this allegation is required under Ohio General Code, Section 11828 (Appendix B), which provides in substance that when an affidavit is filed stating that affiant has good reason to believe, and does believe, that any person, etc., has property of the defendant in his possession, an order of attachment, etc., shall be left with such person. The affidavits filed in the state court stated that the affiant had good reason to believe but omitted the allegation, in conformity with the generally accepted practice in Ohio that affiant "did believe."

The Supreme Court of the State of Missouri was required to pass upon precisely the same question and found that the allegation that the affiant "has good reason to believe" was the equivalent of alleging that "he does believe."

*Massey vs. Scott*, 49 Mo. Rep. 278.



The first paragraph of the syllabus in *Massey vs. Scott, supra*, follows:

"That an affidavit in an attachment suit that deponent 'has good reason to believe that defendant has absconded,' etc., without alleging that 'he does believe,' etc., is sufficient."

It seems almost too obvious to argue that if one has knowledge of facts which negative his belief in a matter, he cannot have "good reason to believe" that it is true. This is simple, elementary logic. Hence the affidavit in the state court sufficiently complied with the statute.

We have previously pointed out that the attachment statutes and the proceedings thereunder are remedial in character and must be liberally construed to secure substantial justice between the parties. The allegations of the affidavit conformed to the well established practice in Ohio. See Baldwin's Ohio Civil Practice Manual, (1936 Revision) Form 312.

**(c) CLAIMS THAT AFFIDAVIT FAILED TO DESCRIBE ANY PROPERTY AND DESCRIBED ONLY "JOINT" PROPERTY ARE INCONSISTENT AND OTHERWISE WITHOUT MERIT**

**It Is Not Necessary to State the Amount of the Debt Sought to Be Attached, Nor to State Whether the Debt Is Owing to One or Both of Joint Defendants.**

It has been claimed that the affidavits filed in the state court were defective and failed to describe the property sought to be attached. The affidavits in question recited that the named garnishees

"\* \* \* have moneys, property and assets of defendants Devon Syndicate, Ltd., and Paris E. Singer in their possession. \* \* \*" (R. pp. 6, 12.)

It is apparently claimed that the plaintiff failed to state how much money the named garnishees had in their possession. With equal force it might be argued that no money was attached if the plaintiff had recited that the named garnishee held \$100.00 whereas the amount actually was \$101.00. In short, where the property sought to be attached is money in the hands of a garnishee, it is not necessary to state the amount.

In any event the requirement that the property be described is not for the benefit of the defendant but for the benefit of the garnishee. It has been uniformly held that the garnishee may waive any of his own rights by appearing and answering.

Jenike vs. Preston, 36 Oh. App. 368, 173 N. E. 258;

Keppel vs. Moore, 66 Mich. 292, 33 N. W. 499;

Altona vs. Dabney, 37 Ore. 334, 62 P. 521;

Woodstown Bank vs. Trainer, 209 Pa. 398, 58 A. 816;

Goll vs. Hubbell, 61 Wis. 293, 21 N. W. 288.

It is also claimed that the affidavits referred solely to property owned jointly by the defendants, Paris E. Singer and Devon Syndicate, Ltd.

By the use of the conjunction "and" in the affidavits from which the quotation above is taken, not only the joint property of both defendants is included, but also the individual and separate property of either of them.

Aultman, Miller & Co. vs. Markley, (Minn.)

63 N. W. 1078;

Bayer vs. Lovelace, 204 Mass. 327, 90 N. E.

538;

6 C. J. 129, Sec. 196.

The second paragraph of the syllabus in the case of *Aultman et al. vs. Markley*, 63 N. W. 1078, *supra*, is as follows:

"In an action against two defendants, an affidavit of garnishment which states that the garnishee 'is indebted to the said defendants in an amount exceeding the sum of \$50.00' is sufficient to charge the garnishee for a debt due from him to one of the defendants alone."

The analysis of this situation by the court in the above action at page 1079 is illuminating:

"2. The affidavit of garnishment states that the garnishee 'is indebted to the defendants in an amount exceeding the sum of Fifty Dollars (\$50.00)' but does not otherwise state that the garnishee is indebted to the defendant W. D. Markley, or to him alone. It is contended that no debt can be garnisheed by this affidavit but a debt due to the defendants jointly; that by this affidavit the garnishee is charged as debtor of W. D. Markley alone. \* \* \* We are of the opinion that in this respect the affidavit is sufficient. *When the affidavit contains all the terms of the statute, connected by conjunctives, not by disjunctives, we are of the opinion that, under the rules which should be applied to the summary proceeding of garnishment, it covers all property, effects and indebtedness in the hands of the garnishee which can, by garnishment proceedings, be appropriated to the payment of the plaintiff's judgment against the defendant.*" (Italics ours.)

The cases of *Winchester et al. vs. Pierson et al.*, 1 Oh. D. Rep. 169, and *Fiedler vs. Blow et al.*, 1 Oh. D. Rep. 245, are without significance because the opinions do *not* quote the phraseology of the affidavits, but merely the courts' conclusions as to the meaning of the language used.

The arguments based on the foregoing claims are without merit and cannot support the decision of the court below.

**(d) THE SHERIFF'S RETURNS UPON THE ORDERS OF ATTACHMENT AND NOTICES TO GARNISHEES IN THE STATE COURT WERE REGULAR AND PROPER**

**It Is Not Necessary to Recite in the Return That a Copy of the Order Was Left With the Garnishee Named in the Affidavit, and the Returns on the Order of Attachment and Notice to Garnishee Are to Be Construed Together.**

It was argued below that the sheriff's returns on the orders of attachment were defective because the names of the garnishees served and the time each was served were not stated, although these facts all appear on the returns on the "Notice to Garnishee."

It was also argued that the returns on the notices to garnishees are not authorized by statute, and that all returns were defective in that none of them recited that copies of the orders of attachment had been left with the named garnishees, *although this was in fact done* (R. 44).

Ohio General Code, Section 11836, provides in part:

"The officer shall return upon every order of attachment what he has done under it. The return must show the property attached and the time it was attached. When garnishees are served, their names and the time each was served must be stated."

There is no requirement in the statute and it is not necessary for the sheriff to return on the order of attachment, or elsewhere, that a copy of the order was left with the garnishee named in the affidavit.

Weirick vs. Mansfield Lumber Co., 96 O. S. 386, 117 N. E. 362, *supra*.

"The fourth paragraph of the syllabus in the *Weirick* case follows:

"The return made upon the writ of attachment is governed by Section 11836, General Code, in which certain things 'must' be shown. The legislature having specified those things a court is not authorized to amend the statute by adding thereto. That is, as applied to this particular case, an amendment to the return showing that a copy of the order was left with the owner is not essential to the validity of the return."

Opposing counsel relied upon the case of *Green vs. Coit*, 81 O. S. 280, below. Insofar as this case sustains the proposition for which it was cited, it has been expressly overruled by the later case of *Weirick vs. Lumber Company*, 96 O. S. 386, 117 N. E. 362, *supra*, wherein the Supreme Court of Ohio, in 96 O. S., says at page 399:

"\* \* \* Insofar as the *Coit* case extends the requirements of the return beyond the plain mandatory provisions of the statute, the same is disapproved."

The remaining question is whether the sheriff properly returned the names of the garnishees and the time each was served.

The forms for orders of attachment and notices to garnishees issued by the clerks of courts in Ohio have, on the reverse side of each, an appropriate form to be filled in by the sheriff for his return. The practice from time immemorial has been for the sheriff to make two returns—one on the reverse side of each.

In the case at bar the sheriff returned on the back of the order of attachment that no property of the defendant could be found (R. 9), and on the notice to garnishee the names of the garnishees served and the time they were served, as required by the provisions of G. C. Section 11836 (R. 11, 14).

The law is clear that the two returns are to be considered and construed together.

Rosenhan vs. Cohen, 13 Oh. C. C. (N. S.)  
102, 22 Oh. C. D. 637.

The second paragraph of the syllabus in the foregoing case follows:

“Where there are debts owing to the defendant corporation in the county, service may be had on a secretary or agent if no other chief officer can be found in the county; and where the attachment and service of summons were issued together and returned in the same way by the constable, the two returns may be read and construed together as showing a lawful service of summons.”

General Code Section 11836 does not require that the names of the garnishees served and the time each was served be returned on the order of attachment, and the



procedure followed in the case at bar is entirely regular and proper, containing all the necessary facts required by the statute in question to be returned. This is especially true in view of General Code Section 10214, providing that attachment statutes shall be liberally construed to achieve substantial justice between the parties.

In any event the returns of a sheriff can be amended at any time to show the correct facts, and are not fatal defects.

Fountain vs. Detroit, etc. Ry. (D. C., N. D., Ohio) 210 F. 982;

Paulin vs. Sparrow, 91 O. S. 279, 110 N. E. 258.

The second paragraph of the syllabus in *Fountain vs. Detroit, etc., Ry.*, 210 F. 982, *supra*, follows:

“Where process has been properly served but the return of the officer is insufficient, the defect may be corrected by an affidavit of the officer showing the facts.”

And in *Paulin vs. Sparrow*, 91 O. S. 279, *supra*, the third paragraph of the syllabus is quoted below:

“3. A court has the authority to order the return of process amended in accordance with the facts relating to such service either before judgment or at any time after judgment that the evidence is available to establish the facts upon which the judgment of the court ordering the return amended is predicated.”

Since the return on the notice to garnishees shows the name of each garnishee served, and the time each was served, no further affidavit should be necessary

under the holding of *Fountain vs. Railway*, 210 F. 982, *supra*.

In short, this highly technical argument that the sheriff's returns are defective is utterly without merit and its only purpose is to confuse the issues in this case.

**(e) THE PROCEEDINGS IN THE STATE COURT  
WERE NOT ABANDONED BY THE PLAINTIFF**

**The Purpose of the Proceedings in the Federal Court  
Was to Preserve All Rights Previously Acquired and  
to Secure the Attachment of Further Assets.**

It was urged below that by filing the amended and supplemental petition and affidavit in the federal court, the issuance of orders thereunder and subsequent publication, the plaintiff (petitioner) abandoned all of the previous proceedings in the state court as a matter of law.

Obviously, such a result was never intended. Whether or not there has been an abandonment of rights previously acquired is a conclusion of fact. The law will not impute such an intent.

The precise question was presented to the Supreme Court of Connecticut in *Lawrence vs. Security Co.*, 56 Conn. 423; 15 A. 406; 1 L. R. A. 342. At page 345 in the report in Volume 1 L. R. A., the court uses the following language:

“This question of intent is one of fact, and there is no finding of abandonment; and inasmuch as the plaintiff might in effect acquire additional security by the attachment of additional property, the law will not impute to him an intentional abandonment of the first suit (garnishment).”

The principal case relied on below by opposing counsel in support of their contention of abandonment is *Smith vs. Wilson*, (La.) 128 So. 682. The case involves a construction of the Louisiana statutes where two orders of attachment were issued under the same affidavit. The facts of the two cases are so obviously different that further comment is unnecessary.

## 5. PROCEEDINGS IN STATE COURT MAY BE AMENDED AFTER REMOVAL

**The Amendment of an Affidavit in Attachment in the Federal Court Makes the Attachment Under the Original Affidavit Valid From the Time Secured Because of 28 U. S. C. A., Sec. 777 (R. S., Sec. 954).**

In addition to the rule that an attachment may be secured under an affidavit filed in a pending action following removal, there is also substantial authority that an affidavit in attachment may be amended so as to render the attachment thereunder valid *ab initio*.

We have previously shown (*supra*, page 17) that under the well established procedure in Ohio if an attachment is void because of a defective affidavit, the affidavit may be amended or a new one filed and an attachment subsequently secured under an order issued pursuant thereto.

Leavitt vs. Rosenberg, 83 O. S. 230;

Pope et al. vs. Hibernia Insurance Co., 24 O. S. 481.

It likewise is well settled that federal courts have full and complete control over pleadings and process with full authority to allow any amendments thereto.

This rule applies to amendments of affidavits in attachment and garnishment. Such an amendment has a retroactive effect and renders the attachment under the defective affidavit valid from the time of the service of the original order.

28 U. S. C. A., Sec. 777, (R. S. 954);

Universal Co. vs. Rederiaktiebolaget, (D. C., N. Y.) 263 F. 243;

Erstein vs. Rothschild, (C. C. Mich.) 22 Fed. 61;

Booth vs. Denike, (C. C., Tex.) 65 Fed. 43;

Nevada Co. vs. Farnsworth, (D. C., Utah) 89 Fed. 164;

Bowden vs. Burnham, (C. C. A. 8) 59 Fed. 752;

Salmon vs. Mills et al., (C. C. A. 8) 68 Fed. 180.

See also:

Phelps vs. Oaks, 117 U. S. 236;

Matthews vs. Dinsmore, 109 U. S. 216;

Stephenson vs. Kirtley, 269 U. S. 163.

Thus 28 U. S. C. A., Sec. 767 (R. S. Sec. 948) provides:

"Any district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues."

28 U. S. C. A., Sec. 777, provides as follows:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil

causes, in any court in the United States, shall be abated, arrested, quashed, or reversed for any *defect or want of form*; but such court shall proceed and *give judgment according as the right of the cause and matter in law shall appear to it*, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such condition as it shall, in its discretion and by its rules, prescribe."

In *Booth vs. Denike*, 65 F. 43, *supra*, there is the following syllabus:

"2. Though, under the decisions of the Texas State Courts, an affidavit for garnishment is not amendable, Rev. St. Sec. 914, providing that the practice, pleadings, and forms and modes of proceeding in the circuit and district courts shall conform as near as may be to those existing in the courts of the state within which the circuit or district courts are held, does not require a federal court to follow such decisions, it being permitted to make the amendment by Sec. 948, authorizing it to allow an amendment of any process where the defect has not prejudiced and the amendment will not injure the party against whom the process issues, and by Sec. 954, authorizing it at any time to permit either party to amend any defect in the process or pleadings on such conditions as it shall, in its discretion, prescribe."

In *Nevada vs. Farnsworth*, 89 F. 164, *supra*, there is the following paragraph of the syllabus:

"Though a complaint on which a writ of attachment is issued fails to allege facts necessary to

give the court jurisdiction, the defect is cured by an amendment, made on the hearing of a motion to discharge the attachment, showing that such facts existed when the complaint was originally filed and the writ issued."

And in *Erstein vs. Rothschild*, 22 F. 61, *supra*, the syllabus is as follows:

"Where a writ of attachment has been issued in a suit instituted in the Circuit Court of the United States on a defective affidavit, the court may, when right and justice require it, allow such affidavit to be amended, although, under the statutes of the state in which the Circuit Court is held; the state court would have no power to allow such an amendment."

The primary consideration in any action *quasi in rem* is whether or not there has been an actual seizure of any property of the defendant pursuant to an order issued in a pending action. Since the federal court by reason of 28 U. S. C. A. Sec. 767 and Sec. 777, quoted above, has full and complete control over all pleadings and process with a power to allow any amendment thereto, it follows that even if the affidavits filed in the state court prior to removal had been defective, which they were not, the amended affidavit filed after removal which was admittedly proper in all respects amended the original affidavit so as to render the attachment thereunder valid from the date of service of the original order of attachment.

## CONCLUSION

The attachments secured in the state court prior to removal were entirely regular and proper, and should be sustained. An attachment secured after the filing of a



petition and issuance of summons is not premature and void because secured prior to the first publication of notice.

If the case had remained in the state court a new affidavit could have been filed in the pending action and additional assets attached thereunder. If this can be done prior to removal it can be done afterwards. The defendant cannot deprive the plaintiff of the remedies provided by the attachment laws of Ohio by removing the case to the federal court.

The attachment statutes of Ohio and all proceedings thereunder are to be liberally construed to promote justice between the parties. The objections to the regularity of the attachments in this case are equally as lacking in merit as they are highly technical and astute.

We respectfully submit that the attachments secured in this action can be and ought to be sustained and that an order be issued herein reversing the court below and remanding the cause to the District Court for further proceedings in accordance with law.

Respectfully submitted,

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*Petitioner,*

By H. W. FRASER,  
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**APPENDIX A**

Section 121 of the Ohio General Code:

"No banker, broker, cashier, director, teller, or clerk of a bank, banker or broker, or other person holding an official relation to a bank, banker, or broker, shall be competent to act as notary public in any matter in which such bank, banker, or broker is interested."

**APPENDIX B**

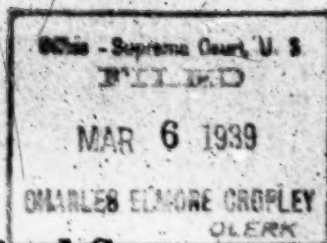
Section 11828 of the Ohio General Code:

"When the plaintiff, his agent or attorney, makes oath in writing that he has good reason to believe, and does believe, that any person, partnership, or corporation in the affidavit named, has property of the defendant in his possession, describing it, if the officer cannot get possession of such property, he must leave with such garnishee a copy of the order of attachment, with a written notice that he appear in court and answer, as hereinafter provided. When the garnishee does not reside in the county in which the order of attachment was issued, the process may be served by the proper officer of the county in which he resides, or be personally served."





FILE COPY



**IN THE  
Supreme Court of the United States**

**OCTOBER TERM, 1938**

---

No. 676

HORTON C. ROBICK,

*Petitioner,*

vs.

DEVON SYNDICATE, LTD., A CANADIAN CORPORATION,

*Respondent.*

---

**BRIEF FOR RESPONDENT IN OPPOSITION TO THE  
PETITION FOR WRIT OF CERTIORARI**

---

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**BRIEF FOR RESPONDENT IN OPPOSITION TO THE  
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---

**I. OPINIONS BELOW**

The opinion of the District Court (filed June 24, 1936) is at pages 47-50 of the Record.

The opinion of the Circuit Court of Appeals (filed January 11, 1939) is at pages 93-98 of the Record. (Reported 100 Fed. (2nd) 844.)

No petition for rehearing was filed in the court below.

## II. STATEMENT OF THE CASE

This is a petition for *certiorari* to review the judgment of the Circuit Court of Appeals for the Sixth Circuit affirming a judgment of the United States District Court, Northern District of Ohio, Western Division, dismissing writs of attachment and garnishment issued on the application of petitioner and dismissing the cause for lack of personal service upon the respondent.

The action was originally brought in the Common Pleas Court of Lucas County, Ohio, against a non-resident foreign corporation, not amenable to personal service, for the recovery of a money judgment, in which the jurisdiction of the court (if any) depended wholly upon property of the defendant being brought within the custody and control of the court through a valid seizure by way of an attachment or garnishment, and substituted service being had by way of publication (R. 2). The statutory ground for attachment and garnishment upon which plaintiff relied in his abortive attempt to thus create jurisdiction in the state court was that defendant was a non-resident foreign corporation and not amenable to service of summons (R. 6). It was not until almost four months after plaintiff's petition was filed that plaintiff actually commenced his action in compliance with Section 11230\* by beginning the requisite statutory publication (R. 15 *et seq.*). Section 11230 provides in part that in an action in which service by publication is proper "the action shall be deemed to be commenced at the date of the first publication."

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\*To avoid repetition, all references to statutory section numbers throughout this brief, unless otherwise indicated, refer to sections of the Ohio General Code, the pertinent statutory provisions of which as herein discussed are printed in Appendix A to this brief in the order in which they appear in the Ohio General Code.



At the time of filing his petition plaintiff knew that personal service on the defendant was impossible as is established by the fact that *concurrently with the filing of his petition plaintiff filed a purported affidavit in attachment and garnishment on the ground that the defendant was a non-resident foreign corporation* (R. 6) (which affidavit was fatally defective as pointed out *post*) ; caused an order of attachment to issue, which was returned unsatisfied (R. 9) ; and caused a notice to be issued for and served upon certain garnishees (the attempted service of which was invalid for failure to leave a copy of the order of attachment with the garnishees as required by Section 11828). *All of these steps were taken some four months prior to the commencement of the action under Section 11230 ante.*

A few days following the filing of the petition, but still several months prior to the statutory commencement of the action as discussed *supra*, plaintiff filed a second affidavit of attachment and garnishment, naming certain additional parties as possible sources of the defendant's property (which affidavit contained the same fatal defects as the first), and in addition (notwithstanding petitioner's statement to the contrary at page 2 of the petition for *certiorari*) *no order of attachment was ever issued or served on this second affidavit* as required by Section 11828. It was not until several months after these premature efforts to institute attachment proceedings that plaintiff took the first step necessary in Ohio to commence an action such as is here involved, under Section 11230 *ante*, viz., began the publication for substituted service, following the completion of which the cause was removed to the United States District Court. Defendant promptly appeared specially and moved for an order quashing the purported substituted service and

dismissing the attachments and garnishments. Both the trial court and the Circuit Court of Appeals below correctly held that all the efforts which plaintiff made in the state court prior to removal and all the steps there taken prior to removal failed to confer jurisdiction upon either the State or Federal Court. Before discussing the reasons for such holding, it should be noted that prior to a decision on defendant's motion the plaintiff, apparently recognizing the soundness of the defendant's position in this respect, undertook after removal to the Federal Court to mend his hold and endeavored to confer jurisdiction on the Federal Court by attempting to revive the void attachment proceeding theretofore had in the State Court, which efforts both the trial court and the court below held were fatally defective and unavailing and amounted to an attempt by the plaintiff to institute a new action in the Federal Court without compliance with the requirements of the law as to service. This phase of the case will be discussed further *post*.

### III. ARGUMENT

#### A.

**THE DECISION OF THE CIRCUIT COURT OF APPEALS WAS CORRECT ON THE GROUNDS ADOPTED BY THAT COURT AND IS SQUARELY AND CORRECTLY PREDICATED UPON APPLICABLE STATUTES OF THE STATE OF OHIO AND IN NO WISE CONFLICTS WITH ANY PERTINENT DECISION OF THE SUPREME COURT OF OHIO.**

1. **The Attempted Attachment and Garnishment Proceedings in the State Court Were Premature and Void, and the State Court Obtained No Jurisdiction of the Cause Prior to Removal to the Federal Court.**

It is well established in Ohio that an attachment may *only* be had "at or after" the *commencement* of the action. Section 11819 provides so far as material:

"In a civil action for the recovery of money, *at or after its commencement*, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:  
\* \* \* (Italics ours.)

As pointed out in the opinion of the Appellate Court below (R. 96), the Supreme Court of Ohio in *Seibert vs. Switzer*, 35 O. S. 661, announced the principle that under the Ohio statutes an attachment issued *prior* to the commencement of the action is *premature and void*.

In that case the Supreme Court of Ohio said:

"The statute does not authorize an attachment except in an action, and the clerk of the court *has no authority to issue the order of attachment until an action is brought*, and the relation of plaintiff and defendant is established in the case." (P. 665.) (Italics ours.)

While the *facts* of that case differed from those involved in the case at bar, the *principle* enunciated in that decision was correctly applied and followed in the case at bar. In that case, unlike the case at bar, the defendant was apparently a resident and hence jurisdiction was not dependent upon seizure of property and substituted service by publication, and the statutory ground of the attachment was that defendant was an absconding debtor rather than, as here, that defendant was a non-resident foreign corporation upon which personal service could not be obtained, and in which substituted service was therefore required to commence the action. In that case the order of attachment was issued several hours before the petition was filed, although the petition was filed on the same day. It was held that the action *had not been commenced* at the time the order of attachment issued, hence there was no action pending when the order of attachment was issued, and the attachment was therefore premature and void. The court further said:

“ . . . The order of attachment being issued by the clerk of the court *before action brought, was unauthorized and void*, and the subsequent commencement of an action, although on the same day, could not vitalize it so as to give it priority over other valid liens.” (P. 665-6.) (*Italics ours.*)

The principle announced by the Supreme Court of Ohio in the *Seibert vs. Switzer* case was that which was followed and applied in differing circumstances by the court below in the case of *Doherty vs. Cremering, et al.*, 83 Fed. (2d) 388, which was followed by the court below in the case at bar. The opinion in *Doherty vs. Cremering, et al.*, *ante*, was rendered for the court below by Judge Allen, who was for a number of years a member of the Supreme Court of Ohio. Her opinion was con-

curred in by Judges Moorman and Hicks. It held that in an action in which, as in the instant case, personal service was impossible, the action "shall be deemed to be commenced at the date of the first publication," as required by Section 11230.

In *Seibert vs. Switzer*, *ante*, the Supreme Court of Ohio in an action where jurisdiction depended upon personal service held that no action is commenced until a petition is filed, *and that an order of attachment issued prior to the commencement of an action is premature and void*.

In *Doherty vs. Cremering*, *ante*, and in the case at bar, the court below held that in an action where service by publication is necessary, no action is commenced until the date of the first publication, and that an order of attachment issued prior to said date is premature and void. While the facts differ, the principle in the two cases is identical.

It was not necessary in *Seibert vs. Switzer* for the Supreme Court of Ohio to consider whether anything more than the filing of the petition was necessary, for there the initial step of filing the petition had not been taken. The court, however, clearly established the principle by that case that *everything* which is necessary to the commencement of an action must be done prior to the issuance of the order of attachment or the order will be void.

*Applying* the principle of those cases, the Appellate Court below in the case at bar correctly held the purported attachment and garnishment in the State Court in the instant case to have been premature, having been some several months prior to the beginning of the substituted service by publication, and hence was null and void under the applicable Ohio statutes, and that hence

the cause came into the Federal District Court upon removal without any jurisdiction having been vested in the State Court over either the defendant or its property.

**2. The Suggestion That the Decision of the Court Below Conflicts With Applicable Ohio Supreme Court Decisions Is Wholly Without Merit.**

As we have shown, the decision of the court below, far from being in conflict with *Seibert vs. Switzer, supra*, as contended by the petitioner (brief p. 8), on the contrary, is based squarely upon and exactly follows the principle announced by the Supreme Court of Ohio in that case, *viz.*, that an attachment attempted to be obtained prior to the commencement of an action is null and void. Petitioner in this regard apparently is confused as between the principle decided by that case and the facts involved.

It is, however, claimed by petitioner (brief p. 8) that the holding of the court below is in conflict with the Ohio decision of *Bacher vs. Shawhan*, 41 O. S. 271. It should be pointed out in the first place that this decision is not a decision of the Supreme Court of Ohio, but is a decision of the "Supreme Court Commission of Ohio," which was a temporary commission which held office for two years in pursuance of an Act of the Legislature of Ohio. (Supplement (1884) to Revised Statutes of the State of Ohio, Williams, Vol. 3, page 761.)

With respect to *Bacher vs. Shawhan*, the court below said in its opinion in the case at bar:

"Under §11819 of the Ohio General Code, in a civil action for the recovery of money, an attachment may be obtained against the property of a non-resident defendant 'at or after' the com-



mencement of the action. We have recently held, *Doherty vs. Cremering et al.*, 83 Fed. (2d) 388, in reliance upon *Seibert vs. Switzer*, 35 O. S. 661; cf. *Henrietta Mining & Milling Co. vs. Gardner*, 173 U. S. 123, that an attachment issuing before personal service is obtained, or before the beginning of the publication for substituted service provided for by G. C. §11292, is premature and void. The case of *Bacher vs. Shawhan*, 41 O. S. 271, was there considered and held not to overrule the *Seibert* case, since it did not construe the statute. We are not persuaded that the present cause, in so far as it involves the timeliness of the attachment in the state court, is to be distinguished from the *Cremering* case, or that that case was wrongly decided." (R. 96.)

Moreover, as will appear from a mere cursory reading of *Bacher vs. Shawhan*, *ante*, the issue there involved and decided was as to whether the action should have been dismissed for plaintiff's delay or neglect in obtaining service, i. e., for failure to prosecute (which, as the court pointed out, was a matter within its discretion) and not, as here, the quashing of the purported attachment and substituted service upon which the jurisdiction of the court depended.

Also, as is said by Judge Allen in *Doherty vs. Cremering et al.*, *ante*:

"The case of *Bacher vs. Shawhan*, 41 Ohio St. 271, relied upon by the District Court, is not cited in any subsequent decision of the Ohio court or last resort. It does not overrule *Seibert vs. Switzer*, *supra*, and neither does it consider the statute requiring that an attachment may be obtained 'at or after' the commencement of the action. As the decision does not construe Section 11819, which we consider controlling, and since *Seibert vs. Switzer* specifically interpreted that statute, we think that *Bacher vs. Shawhan* is not in point." (P. 389.)

The only other decision of the Ohio court of last resort with which petitioner claims the holding in the instant case is in conflict is that of *Lessee of Paine vs. Mooreland*, 15 Ohio 435. The decision is not only not in point but obviously could have and has no importance here, since it was decided in 1846, some six years before the enactment of the controlling statutes upon which the decision below is premised, viz., Section 11819, *ante* (51 Ohio Laws 86, enacted in 1852) and Section 11230, *ante* (51 Ohio Laws 60, enacted in 1852).

Of the remaining four cases cited as decisions with which the holding in the instant case is claimed to be in conflict, none are decisions of the court of last resort in Ohio, viz., the Supreme Court; all are decisions of Ohio courts of inferior jurisdiction. Two of the four (*Central Savings Bank vs. Langenbach et al.*, 1 O. N. P. 124, and *Royal Indemnity Co. vs. Agrios*, 7 Ohio Opinions 272) are decisions of Courts of Common Pleas, i. e., county trial courts, and the remaining two (*St. John vs. Parsons*, 54 O. A. 420, and *Citizens National Bank vs. Insurance Co.*, 12 O. C. C. (N.S.) 401) are decisions of intermediate appellate courts. Neither the *Langenbach* nor *Parsons* cases make any mention of or give any consideration to the controlling effect of either Sections 11819 or 11230, *ante*, the *Union Central Insurance Co.* case considers only Section 11819, and makes no reference to the equally important Section 11230, and the *Agrios* case (one of the Common Pleas decisions) is the only one in which the two statutes are considered, and the trial judge rendering that decision makes this revealing comment at page 272 of the opinion:

"So far as counsel and the court have been able to ascertain a direct decision on this question (i. e., related effect of Sections 11230 and 11819) has never been reported." (Matter in parentheses ours.)

This observation in the face of the decision of *Doherty vs. Cremering et al.*, 83 Fed. (2d) 388 (C. C. A. 6) *ante*, theretofore decided, as well as the decision of an Ohio court of equal jurisdiction, *Bear vs. Old Tyme Distilleries, Inc.*, 5 Ohio Opinions 530, in which a conclusion was reached precisely the reverse of that reached in *Royal Indemnity Co. vs. Agrios*, *ante*. If any consideration whatever is to be given to decisions of Ohio courts of jurisdiction inferior to the court of last resort, it should be noted that *Bear vs. Old Tyme Distilleries, Inc.*, *ante*, squarely supports the decision in the instant case and in *Doherty vs. Cremering et al.*, *ante*.

**3. The Attempted Attachment and Garnishment Proceedings in the State Court Were Likewise Invalid on the Issue Determined and the Ground Assigned By the Trial Court Below and on Which the Appellate Court Below Found It Unnecessary to Pass.**

The trial court found upon the evidence adduced in support of the defendant's motion to quash and dismiss that the affidavits upon which the attempted attachment and garnishment proceedings in the state court rested were fatally defective and contrary to Section 11532 (which requires that the acknowledging officer must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding) in that the notary before whom both affidavits were sworn, occupied such a relationship to the plaintiff as that he was disqualified under the statute (R. 49). The conclusion of the court in this regard was:

"I do not think the courts should pronounce their benediction upon a practice which would permit one circumstanced as was Mr. Drennan to preside at the taking of depositions." (R. 49.)

The appellate court below found it unnecessary to pass on this issue, and yet if correctly decided by the trial court, as we believe it was for reasons to be briefly discussed presently, the decision below of which petitioner complains is valid and correct without regard to the reasons urged in the petition for allowance of the writ, and if allowed this court would examine this and the other additional grounds urged in the court below in support of the judgment (*United States vs. American Railway Express Co.*, 265 U. S. 425, 435). This would necessarily involve a review of the evidence and a finding as to specific facts. We do not understand that this court ordinarily grants *certiorari* for that purpose. (*General Pictures Co. vs. Electric Co.*, 304 U. S. 175, 178; *Southern Power Co. vs. Public Service Co.*, 263 U. S. 508; *U. S. vs. Johnston*, 268 U. S. 220, 227.)

The relationship between plaintiff and the notary at the time of the filing of the affidavits in attachment as shown by the record was as follows:

Plaintiff was a prominent partner in and president of the partnership bearing his name (Spitzer-Rorick & Company), through which partnership he was engaged in the municipal bond business as a broker (R. 62, 67). Plaintiff was also president of The Spitzer Rorick Trust & Savings Bank (the garnishee in whose hands the funds of defendant were attempted to be attached) and through which he engaged in the banking business at Toledo, Ohio (R. 5, 31.) The notary Drennan was and has been a lawyer employed by plaintiff's partnership continuously since his admission to the bar in January, 1916 (R. 61). In such capacity he did work for the partnership, for the plaintiff's bank, and on at least one occasion handled some personal matters for one of plaintiff's sons (R. 64). Drennan notarized, in addition to plain-

tiff's two affidavits in attachment and garnishment (R. 7, 13), plaintiff's affidavit for substituted service (R. 15), the answer of plaintiff's bank as garnishee (R. 26), the answer of plaintiff and associated voting trustees as garnishees, and the answer of another garnishee (omitted from printed record).

Not only was this notary a lawyer for the plaintiff and his partners and banking interests, but he was employed as such as his principal business and means of livelihood by plaintiff's partnership (R. 64). This intimate personal relationship between plaintiff and the notary whose "livelihood depended in a large measure upon the goodwill" of plaintiff surely was at least as close and direct as that of a relative, who, like an attorney or other interested person, is expressly forbidden to act as notary (Ohio General Code Section 11532, *ante*). This disqualification should not be confused with that provided by statutes of other states or where the disqualification is alleged to arise solely by reason of an asserted financial interest in a particular case.

Leavitt vs. Rosenberg, 83 O. S. 230.

Wuerth vs. Wuerth, 250 N. W. 520 (Mich.).

Duke of Northumberland vs. Todd, 7 Ch. Div. Law Reports 777.

Ross vs. Shearman, 2 Cooper's Reports, Temp. Cott. 172.

The relationship of the notary here was not only that of an attorney, but was so close and intimate and so widespread in plaintiff's affairs as to make the notary personally interested in all of plaintiff's transactions such as the one here involved, and as the trial court properly said, disqualified him under the statute "from presiding impartially at the taking of depositions." In

passing over this point without deciding it, the Circuit Court of Appeals erroneously stated that the pertinent statute had since been amended. There has been no amendment as to the attachment and garnishment statute so as to permit the taking of such an affidavit by an attorney for one of the parties.

In addition, the notary was further disqualified under Ohio General Code Section 121, as an employee of plaintiff, who was a banker and a broker.

4. **Under the Decisions of the Supreme Court of Ohio the Void Attachment and Garnishment Proceedings in the State Court Were Not and Could Not Be Revived Nor Was Jurisdiction Conferred Upon the Federal Court by the Additional Proceedings Had in the Federal Court Some Five Years Later.**

It is submitted that it is entirely clear for the reasons stated by the Circuit Court of Appeals as well as for the reasons assigned by the trial court, that the attempted attachment and garnishment proceedings in the state court were a legal nullity, wholly failed to confer any jurisdiction upon the state court, and that consequently the cause was removed to the federal court without any jurisdiction having theretofore attached either over the defendant or any of its property.

Shortly following the removal of the cause to the trial court below, defendant appeared specially and moved to quash the pretended service and dismiss the pretended attachment and garnishment proceedings (R. 26). More than five years thereafter plaintiff filed what was styled "Supplemental and Amended Petition" (R. 29), which was identical with the original petition "in all respects material to this appeal" (Petition for *Certiorari*, p. 2).



This new petition contained a praecipe (R. 32) directing the clerk of the federal court to issue summons for the defendant, which was addressed to the United States District Marshal and directed him to notify the defendants "*that they have been sued. \* \* \* in the District Court of the United States within and for the Western Division of the Northern District of Ohio*" (R. 86). The praecipe also directed the clerk to issue an order of attachment and garnishment addressed to the United States District Marshal to be served upon the *identical garnishees* theretofore attempted to be served in the state court. The summons was returned "not found" (R. 86). Plaintiff also filed what was styled "Supplemental affidavit in garnishment" (R. 33) naming the identical garnishees theretofore named in the previous affidavits, describing the identical property which petitioner now claims was reached by the attachment theretofore attempted in the state court and one additional item of property, but this affidavit was sworn to before a different notary. Some time later plaintiff filed an affidavit for substituted service by publication (R. 85), thus again rendering the attempted attachment premature and void under the Ohio statutes and decisions *ante*. In other words, plaintiff performed all of the acts that he was required to perform to commence a new suit in the federal court except obtain service of summons upon the defendant, and even this plaintiff attempted unsuccessfully.

It is entirely clear that the proceedings in federal court were not intended to be and were not in fact either amendments of the proceedings followed in state court some five years before, nor as petitioner now appears to claim (brief 19), merely an attempt to reach an additional item of property, but in fact and effect were nothing more nor less than an abortive attempt to commence

a new suit in the federal court and to sue out a complete new attachment against a non-resident of the district without obtaining personal service, and both courts below so hold (R. 49 *et seq.*, 96 *et seq.*).

But *a arguendo*, even if plaintiff by his efforts intended an amendment to the state court proceedings, it is entirely clear under the law of Ohio that those proceedings being based upon defective affidavits and being premature (Sections 11230 and 11819) were a legal nullity and could not be amended so as to vivify the void writ.

In *Leavitt vs. Rosenberg*, 83 O. S. 230, it is said in Syllabus 4:

"The levy of an order of attachment, based upon an insufficient affidavit, cannot be upheld by an amendment of the affidavit."

See also page 240 *et seq.* of the opinion.

The *Leavitt* case, relied upon by the trial court (R. 49), simply follows the long settled and well established law in Ohio. See *Pope vs. Hibernia Insurance Company*, 24 O. S. 481, Syllabi 1 and 2, and *Endel vs. Leibrock*, 33 O. S. 254. In Syllabi 1 and 2 of this latter case the Supreme Court of Ohio says:

"A writ of attachment under the code, without the requisite affidavit, is void." (Syl. 1.)

"The seizure of property of a non-resident debtor, upon whom service of summons can not be made on such void writ, does not give the court such jurisdiction over the defendant or his property as will authorize a service by publication, or a judgment in the action." (Syl. 2.)

In *Scibert vs. Switzer*, 35 O. S. 661, *ante*, at page 665 *et seq.*, the court says with reference to a premature attachment:

"The order of attachment being issued by the clerk of the court before action brought, was unauthorized and void, and the subsequent commencement of an action, although on the same day, could not vitalize it so as to give it priority over other valid liens."

In view of these controlling decisions of the Supreme Court of Ohio, *supra*, it seems hardly necessary to point out that the cases set forth at pages 17 and 18 of petitioner's brief, all of which are from jurisdictions other than Ohio, in support of the claim of petitioner that a defective affidavit may be amended, should be regarded as neither persuasive nor controlling.

Under the Ohio decisions, *supra*, had the action remained in the State Court the defects in the proceedings could not have been cured by amendments. Petitioner's claim to the contrary ignores the indisputable premise that in the instant case, prior to removal, the jurisdiction of the state court to hear and determine the cause, and after removal, the like jurisdiction of the Federal Court, depended entirely upon jurisdiction having been obtained over the defendant's property, which in turn depended exclusively upon the validity of the attachment proceedings, and that those proceedings being null and void, were non-amendable.

Nor was there an action pending, for the attempted substituted service by publication in the State Court was invalid, since there was no notice of the seizure of any property and no property was lawfully seized upon which the notice might operate (*Pennoyer vs. Neff*, 95 U. S. 714, *Crary vs. Dye*, 208 U. S. 515). Moreover, the notice was fatally defective (Section 11,295; *Balsmeyer vs. Lansdale, et al.*, 27 O. A. 125) for failure to notify the defendant that the action was one in which it was sought by provisional remedy to take or appropriate certain

property of the defendant (R. 16) which was the statutory ground set forth in the affidavit for constructive service (R. 15). All that remained, therefore, was a petition lodged with the clerk and all the steps necessary to commence the action had to be taken. (See *Cleveland and Western Coal Co. vs. J. H. Hillman and Sons Co.*, 245 Fed. 200 (Ohio)).

*A fortiori*, we believe it is equally clear that petitioner's claim that the steps taken in Federal Court after removal vivified the void state proceedings, is wholly untenable. Petitioner relies upon 28 U. S. C. A. Section 777, the pertinent provisions of which are as follows:

"No summons . . . return, process . . . or other proceedings in civil causes, *in any court of the United States*, shall be abated, arrested, quashed or reversed *for any defect or want of form.* . . ." (Italics ours.)

It will be noted that this section specifically refers to "summons . . . return, process . . . or other proceedings in civil causes, *in any court of the United States*, . . ." (italics supplied), whereas all the proceedings we claim to be non-amendable were had in the Common Pleas Court of Lucas County, Ohio. Moreover, the section refers only to a "defect or want of form," whereas under the decisions of the Supreme Court of Ohio, *supra*, both a valid affidavit and a writ "at or after" the commencement of an action are jurisdictional requisites to proceedings in attachment, hence a defect therein is a jurisdictional defect and not merely one "of form."

Likewise, the Federal Court cases cited in support of the asserted amendability deal with actions *originally commenced* in the District Courts of the United States, wherein *personal service* had been made upon the defend-

ants, as the attachment there is by virtue of the laws of the United States, and is merely incidental to the action. In the case at bar the attachment is the essential prerequisite upon which the jurisdiction of the court depends. See *Pennoyer vs. Neff*, (1877) 95 U. S. 714, 728.

Plaintiff's claim that notwithstanding the decisions of the Supreme Court of Ohio precluding the amendment of the attachment proceedings, nevertheless such amendment is permitted under the federal law, involves the specious premise that under the federal law life may thus be breathed into attachment proceedings which under the state law were admittedly void and of no effect, a legal nullity, and jurisdiction thus conferred upon the federal court in a manner neither permitted by the state law in actions there commenced nor by the federal law in actions there commenced.

The steps taken in federal courts were therefore ineffective as an amendment to the proceedings theretofore had in the state court.

## B.

### **THE SUGGESTION THAT THE APPELLATE COURT BELOW MISCONSTRUED SECTIONS 79 AND 726 OF TITLE 28 U. S. C. A. IS UNTENABLE.**

The steps taken in federal court were equally invalid as *de novo* attachment proceedings in the absence of personal service. *Big Vein Coal Co. vs. Reed*, 229 U. S. 31; *Laborde vs. Ubarri*, 214 U. S. 173; *Ex parte Railway Co.*, 103 U. S. 794; *Chaffe vs. Hayward, et al.*, 20 Howard 208, 215; *Toland vs. Sprague*, 12 Peters 300; *Cleveland and Western Coal Co. vs. J. H. Hillman and Sons Co.*, 245 Fed. 200 (construing the Ohio statutes here involved). Similarly see *Sandusky Cement Co. vs. Hamilton & Co.*,

273 Fed. 596 (Ohio); 28 U. S. C. A., Sections 81, 79 and 83.

Petitioner argues that the rule by this court announced in the *Big Vein Coal Co.* and like cases should not apply to a case commenced in state court even when no valid attachment was there secured and no jurisdiction over the defendant there obtained prior to removal. No decisions are cited for the claimed distinction and the argument is cogently answered in the opinion of the Court of Appeals below (R. 96 *et seq.*). See the decision of Circuit Judge, later Mr. Justice Van Devanter in *Hatcher vs. Supply Co.*, 133 Fed. 267 (C. C. A. 8). The decision of the late Judge Westenhaver in the *Hillman and Sons* case, *supra*, is flatly to the contrary of petitioner's contention. Also see *Pratt vs. Denver, etc., R. R. Co.*, 284 Fed. 1007.

Petitioner apparently relies on Sections 79 and 726 of Title 28 U. S. C. A. in support of this claim, but Section 79 manifestly purports to hold upon removal *only* such property of the defendant as has theretofore been *validly* attached in the state court and Section 726 merely provides that in common law causes in the district courts the plaintiff shall be entitled to similar remedies by attachment or other process against the property of the defendant which are provided by the laws of the state. The section makes no distinction as between actions originally commenced in federal courts and those removed to such courts; its terms manifestly apply to all "common law causes" in the federal court without regard to origin. Moreover, petitioner's contention overlooks the fact that this purported attachment in federal court, like those previously attempted in the state court, was premature and hence void under the law of Ohio, the writ having been issued prior to the beginning of publica-



tion for substituted service and hence prior to the commencement of the action.

Had the cause remained in state court the plaintiff would have been required to have recommenced the action. (See *ante*.) The cause came into the federal court without any jurisdiction of any kind having attached either to the defendant or defendant's property. It is well established that the federal court takes the case precisely in the condition it was when the order of removal was made, with full power to dispose of all phases of the controversy.

*Ex parte Fisk*, 113 U. S. 713, 725.

*Remington vs. Central Pacific Railroad Co.*,  
198 U. S. 95.

*Lebensberger vs. Scofield, et al.*, 139 Fed.  
380.

*Hatcher vs. Supply Co.*, 133 Fed. 267.

*Dicks-David Co. vs. Maurer Co.*, 279 Fed.  
281.

*Adams vs. Heckscher*, 80 Fed. 742.

*Bull vs. Chicago, etc., Ry. Co.*, 6 Fed. (2d)  
329.

In such circumstances jurisdiction must be obtained and the cause proceeds as if originally commenced in the federal court (28 U. S. C. A. Sections 72, 79, 81 and 83).

### C.

**THE SUGGESTION THAT THE DECISION OF THE COURT BELOW CONFLICTS WITH CLARK V. WELLS, 203 U. S. 164, IS WHOLLY WITHOUT MERIT.**

Petitioner's claim in this regard overlooks the fact that in *Clark vs. Welles, ante*, there had been a valid

seizure under the laws of Montana of property of the defendant prior to removal, whereas in the instant case there was neither a valid seizure of property under the laws of Ohio nor jurisdiction over the defendant obtained prior to the removal. Therein lies the distinction between the case at bar and the cases cited at pages 20-22 of petitioner's brief.

### CONCLUSION

There are no such compelling circumstances here as this court has uniformly held requisite to the granting of *certiorari*. No questions of wide or public importance are presented. All that is involved is an attachment proceeding under the Ohio law to which the court below applied the statutes and law of Ohio as interpreted by the highest court of that state. There is no question of an attempt to apply the general as distinguished from the local law, nor is there a conflict between the decision below and the decisions either of this court or the highest court of the state of Ohio. We do not understand that *certiorari* is granted merely to give the defeated party another hearing, particularly where, as here, no petition for rehearing was filed below (*Magnum vs. Coty*, 262 U. S. 159, 163).

Respectfully submitted,

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## APPENDIX

## A

Sections of the General Code of Ohio Involved, Cited  
or Discussed.*Section 121:*

"No banker, broker, cashier, director, teller, or clerk of a bank, banker or broker, or other person holding an official relation to a bank, banker, or broker, shall be competent to act as notary public in any matter in which such bank, banker, or broker is interested."

*Section 11230:*

"An action shall be deemed to be commenced within the meaning of this chapter, as to each defendant, at the date of the summons which is served on him or on a co-defendant who is a joint contractor, or otherwise united in interest with him. When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication, if it be regularly made."

*Section 11292:*

"Service may be made by publication in any of the following cases:

"7. In an action in which it is sought by a provisional remedy to take or to appropriate in any way property of the defendant, when the defendant is not a resident of this state or is a foreign corporation or his place of residence can not be ascertained;

*Section 11295:*

"The publication must be made for six consecutive weeks, in a newspaper printed in the county

where the petition is filed. When made in a daily newspaper, one insertion a week shall be sufficient. It must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer."

*Section 11532:*

"The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding."

*Section 11819:*

"In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:

"1. Excepting foreign corporations which, by compliance with the law therefore, are exempted from attachment as such, that the defendant or one of several defendants is a foreign corporation;

"2. Is not a resident of this state;

*Section 11828:*

"When the plaintiff, his agent or attorney, makes oath in writing that he has good reason to believe, and does believe, that any person, partnership, or corporation in the affidavit named, has property of the defendant in his possession, describing it, if the officer cannot get possession of such property, he must leave with such garnishee a copy of the order of attachment, with a written notice that he appear in court and answer, as hereinafter provided. When the garnishee does not reside in the county in which the order of attachment was issued, the process may be served by the proper officer of the county in which he resides, or be personally served."

**United States Statutes Involved, Cited or Discussed***Section 72, 28 U. S. C. A.:*

"Whenever any party entitled to remove any suit mentioned in section 71 of this title, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a state court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court."

*Section 79, 28 U. S. C. A.:*

"When any suit shall be removed from a state court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed."

*Section 81, 28 U. S. C. A.:*

"The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal."

*Section 83, 28 U. S. C. A.:*

"In all cases removed from any State court to any United States court for trial in which any one or more of the defendants has not been served with process or in which the same has not been perfected prior to such removal, or in which the process served upon the defendant or defendants, or any of them, proves to be defective, such process may be completed by the United States court through its officers, or new process as to defendants upon whom process has not been completed may be issued out of such United States court, or service may be perfected in such court in the same manner as in cases which are originally filed in



such United States court. Nothing in this section shall be construed to deprive any defendant upon whom process is so served after removal, of his right to move to remand the cause to the State court, the same as if process had been served upon him prior to such removal."


*Section 726, 28 U. S. C. A.:*

"In common-law causes in the district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process. Similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy."

*Section 777, 28 U. S. C. A.:*

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down; together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall in its discretion and by its rules, prescribe."

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**IN THE  
Supreme Court of the United States**

**October Term, 1938**

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**No. 676**

**HORTON C. ROBICK,**

*Petitioner,*

*vs.*

**DEVON SYNDICATE, LIMITED, A CANADIAN  
CORPORATION,**

*Respondent.*

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**On Certiorari from United States Circuit Court of  
Appeals, Sixth Circuit**

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**RESPONDENT'S BRIEF ON THE MERITS**

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**IN THE  
Supreme Court of the United States**

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October Term, 1938

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No. 676

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HORTON C. RORICK,

*Petitioner,*

*vs.*

DEVON SYNDICATE, LTD., A CANADIAN  
CORPORATION,

*Respondent.*

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**RESPONDENT'S BRIEF ON THE MERITS**

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**PRELIMINARY STATEMENT**

This case is one in which all questions but one are either questions of local Ohio law or questions of fact. The one federal question involved is whether in a removal case *in which the state court has acquired no jurisdiction of either the person or the property of the defendant*, a valid attachment may issue out of the federal

court *without any personal service of summons being had upon the defendant*. Even this federal question is not clearly presented in the case or necessary to its decision, as there are fatal defects under Ohio law in the attempted attachment proceedings in the federal court which would invalidate such proceedings, even if that court *had* power to issue an attachment on proper proceedings without personal service upon the defendant.

Under the circumstances it will be necessary for us to devote much the greater part of this brief to a discussion of questions of purely Ohio law. The federal question does not arise at all unless it be first held that *all* of our contentions and the holdings of both lower courts as to fact and law under Ohio statutes are wrong.

### **STATEMENT OF THE CASE**

We find it necessary to supplement and in some respects correct petitioner's statement of the case.

Petitioner on June 19, 1930, filed as plaintiff in the Court of Common Pleas of Lucas County, Ohio, a petition in which he named as defendants Devon Syndicate, Ltd., and Paris Singer.

Also, on the same day, petitioner filed in said court an "Affidavit in Attachment and Garnishment," in which he alleged that both the defendants were non-residents and that neither could be served with summons in the State of Ohio.

The above mentioned affidavit did not conform to the state law in numerous respects hereinafter set forth under the caption "Argument."

On the same day the petition was filed, a summons

was issued for the defendants, which the sheriff returned, not found, on June 30. (R. 8.)

Also on June 19, 1930, the clerk issued an order of attachment directed to the sheriff, and on the same date issued to the sheriff a separate paper entitled "Notice to Garnishee."

On June 23, 1930, the sheriff made a return of the order of attachment (R. 9), "no money made, not satisfied."

On the 30th day of June, 1930, the sheriff filed the "Notice to Garnishee" with the clerk, with a "return" that he had delivered copies of it to the several garnishees. (R. 11.)

On June 27, 1930, petitioner filed another "Affidavit in Attachment and Garnishment" with the clerk, which was also defective under Ohio law as hereinafter pointed out. Endorsed on this affidavit was a praecipe directing the clerk to issue "Notice to Garnishee" to certain additional persons (R. 12), which was issued the same day. *No order of attachment was requested and none was issued by the state court after the filing of this second affidavit.* The sheriff on July 3, 1930, filed the second Notice to Garnishee with the clerk, with a "return" that he had delivered the notice to the additional garnishees.

Nothing further was done in the case until October 10, 1930, when petitioner filed in the state court an "Affidavit for Constructive Service" (R. 15), alleging the non-residence of Singer and of Devon Syndicate, Ltd., that neither of the defendants could be served in the State of Ohio, and that the action was one in attachment and garnishment and a proper one for service by publication. Notice to the defendants (R. 16) was thereupon

published and proof of publication was filed October 11, 1930. (R. 17.). *The notice was fatally defective in that it did not advise defendants of the object of the action, as no mention was made in it that any proceedings in attachment or garnishment had been commenced.*

On December 5, 1930, the defendants, appearing specially, filed their petition, bond and motion for removal of the cause to the United States District Court, and on that day an order of removal was entered (R. 17-24). On January 15, 1931, The Spitzer Rorick Trust & Savings Bank, one of the garnishees, filed an answer in the District Court, alleging that it was indebted to and held certain property of the defendant Devon Syndicate, Ltd.

On January 26, 1931, the defendant Devon Syndicate, Ltd., appearing specially, filed a motion (R. 26-28) for an order quashing the pretended service of summons upon it by publication, and dismissing the pretended attachments and garnishments of its property for various reasons which are discussed in the argument herein.

Nothing further was done in the case until February 17, 1936, when upon leave of the District Court petitioner filed an Amended and Supplemental Petition in that court. (R. 29.)

Also on February 17, 1936, petitioner filed in the District Court a paper entitled "Supplemental Affidavit in Garnishment." *The attachment proceedings thus attempted to be begun were fatally defective under the law of Ohio, as is pointed out in the argument herein.* On February 17, 1936, prior to the issuance of any summons by the District Court and prior to the beginning of any publication of notice to defendants, an order of

attachment was issued by the District Court to the marshal, and on February 26, 1936, the marshal made a return of this order (R. 36-37). Notices to Garnishees were also issued to the marshal on February 17, 1936 (R. 38-42).

*The present record does not show that any notice to defendants was published after the removal of the cause to the District Court. We are willing to stipulate, however, that in fact a new notice was published, if petitioner will admit, what is the fact, that the proof of publication shows that the first publication in the District Court was on February 19, 1936, and hence after the issuance February 17, 1936 (R. 37), and service, February 18, 1936 (R. 36), of the order of attachment in the District Court and that the notice was in the form set forth in Appendix A to this brief.*

*No summons was issued in the District Court for the defendants until April 4, 1936 (R. 86). The marshal returned this "Not found" on April 6, 1936 (R. 86).*

On April 11, 1936, respondent, still appearing specially, moved the court for an order quashing the pretended service by publication on the plaintiff's Supplemental and Amended Petition and dismissing the pretended attachment and garnishment under the supplemental affidavit in garnishment, for various reasons (R. 43), which are discussed in the argument in this brief.

Thereafter, on June 8, 1936, respondent's several motions to quash were submitted to the District Court on affidavits (R. 66-84), oral evidence and certain stipulations (R. 61-64), and on June 11, 1936, the District Court entered its judgment (R. 50-51).



In its judgment entry the court found:

"\* \* \* that the notary, to-wit, D. W. Drennan, before whom the affidavits in attachment and garnishment dated June 19th and June 27, 1930, respectively, and each of them, were sworn, was not a proper person to act as notary on such affidavits, or either of them, and that such affidavits, and each of them, were void and of no effect."

The court further found that the attempt to attach and garnishee in the District Court

"was void and ineffective for the reason that no personal service had been obtained upon the defendant, Devon Syndicate, Limited, nor the defendant, Paris E. Singer."

The court found it

"unnecessary for it to pass upon the other grounds raised by Devon Syndicate, Ltd., for the granting of its motions."

The court granted the motions to quash, and, as shown by its entry:

"\* \* \* being advised by plaintiff's counsel that the plaintiff desires no further time or opportunity to attempt to obtain personal service of process herein on the defendant Devon Syndicate, Limited, it is further ordered that the attachment and garnishment herein be discharged and that plaintiff's petition and amended supplemental petition be stricken from the files of this court at plaintiff's costs." (R. 51.)

Upon appeal to the Circuit Court of Appeals by petitioner, that court found it unnecessary to pass upon any of the grounds of respondent's motions to quash other than the ground that the attachment had been issued before and not at or after the commencement of

the action in the state court, and that being void for that reason, the District Court after removal had no jurisdiction to issue a new attachment without personal service of summons.

The Circuit Court of Appeals did not pass upon a motion to dismiss the appeal filed by respondent, the grounds of which are hereinafter stated and discussed.

The argument herein will discuss the defects in petitioner's proceedings in the order in which they occurred.

## ARGUMENT

### I

#### (1) THE AFFIDAVIT FOR ATTACHMENT IN THE STATE COURT WAS FATALY DEFECTIVE:

##### (a) The Affidavit for Attachment Did Not State That Affiant "Does Believe" and Did Not Describe Any Property of the Defendant.

In Ohio the provisional remedy of attachment is an extraordinary remedy in derogation of the common law, having its origin solely in statutory law and being in the nature of "an execution in advance" levied in anticipation of the establishment of the claims of the plaintiff in the main action.

*James Ward & Company vs. Howard*, 12 O. S. 158, 162;

*Rempe vs. Ravens*, 68 O. S. 113, 128;

*Green vs. Coit*, 81 O. S. 280, 285.

The order of attachment is issued by the Clerk of the Court as a matter of course upon the tendering of an

affidavit containing the requisite allegations and disclosing the requisite information (Section 11820 O. G. C.). In view of the extraordinary nature of this *ex parte* remedy which thus permits anticipatory execution upon the property of a defendant who is not in court, and who has no actual notice or opportunity to be heard in advance of the issuance of the writ, and which, under some circumstances, even permits the property thus seized to be actually sold in advance of the determination of the rights of the parties (Section 11843 O. G. C.), it is necessarily of particularly great importance that plaintiffs, seeking to avail themselves of such remedy, shall be required to comply precisely and strictly with the applicable statutory requirements requisite to the invocation of the remedy:

*Colwell vs. Bank*, 2 Ohio 228;

*Taylor vs. McDonald*, 4 Ohio 149;

*Gury vs. Tannenwald*, 18 Ohio 481, 487;

*Miller vs. Veldhuyzen*, 13 O. N. P. (N.S.)  
546;

*Mead vs. Rice*, 19 O. N. P. (N.S.) 173;

*Coal & Coke Company vs. Pocahontas*, 17 O.  
D. 151, 152.

The pertinent portion of Ohio General Code Section 11828, provides as follows:

"When the plaintiff \* \* \* makes oath in writing that he has good reason to believe, *and does believe*, that any person \* \* \* in the affidavit *named*, has property of the defendant in his possession, *describing it*, if the officer cannot get possession \* \* \* *he must leave with such garnishee a copy of the order of attachment*, with a written notice that he appear in court and answer, as hereinafter provided. \* \* \*" (Italics ours.)

Thus, in Ohio, a sworn affidavit is a mandatory jurisdictional prerequisite to a valid issuance of an order of attachment. The statute (Section 11828) definitely prescribes the form and contents of such affidavit. Plaintiff must state under oath "that he has good reason to believe, *and does believe*" etc., *and must describe the property sought to be attached.*

In this case two affidavits were filed by plaintiff in the Court of Common Pleas (R. 6 and 12) as the basis for the orders of attachment issued in that court. Although both affidavits were defective in the respects hereinafter mentioned we are concerned only with the affidavit first filed (R. 6) as no order of attachment was issued upon the second affidavit (R. 12). *The petitioner's statement to the contrary on page 2 of the petition for certiorari and on page 2 of his brief herein is erroneous.* We therefore confine our discussion to the affidavit first filed.

That affidavit was fatally defective for failure to comply with Section 11,828, in that it merely stated:

"Affiant further says that he has good reason to believe that" etc.

At no place in the affidavit does the plaintiff allege that he "does believe" that the named garnishees "have property of the defendant in his possession," nor is there any description of any property of the defendant claimed to be in the possession of the garnishees as affirmatively and specifically provided by Section 11828. The words "moneys, property and assets" found in the affidavit clearly do not comply with the mandate of Section 11828, that plaintiff's affidavits shall *describe* the property.

In practice, the foregoing provisions of the statute have been uniformly regarded in Ohio as mandatory prerequisites to any valid affidavit upon which an order of attachment may be properly predicated, and on such few occasions as the courts have been called upon to formally pass upon the effect of an attempted departure from such practice, they have uniformly held non-complying affidavits to be insufficient and void. It is not the fact that the provisions of Section 11828 are for the benefit of the garnishee and not of the defendant. None of the cases cited on page 32 of petitioner's brief so holds.

In the unreported case of *The Spitzer Rorick Trust & Savings Bank vs. Thompson*, No. 123,017 on the docket of the Common Pleas Court of Lucas County, Ohio, the bank (one of the companies controlled by the petitioner in the present case) was represented by the same attorneys who represent the petitioner in this court and who represented the petitioner as plaintiff in the courts below. The affidavit in attachment in the *Thompson* case was attacked on motion on the same ground that defendant has raised in the instant case, namely, that there was no allegation that affiant "believed" that the garnishee had property of the defendants. The matter was fully briefed and orally argued to the court, following which the motion to quash the attachment was granted. The journal entry of the court provided in part that:

"This day this cause came on for hearing, on the motion of the defendants \* \* \*, to quash the constructive service upon said defendants and to dissolve the attachment issued herein and discharge the garnishees \* \* \*, and the court, on due consideration, finds that said motion should

be granted and grants the same for the *sole reason* that *the affidavit* in attachment and garnishment herein is defective in that it *fails to state that affiant believes* the garnishees have property of defendants in their possession. \* \* \* To all of the foregoing plaintiff excepts." (Italics ours.)

See also the decision of the late Judge Westenhaver in *Sandusky Cement Company vs. Hamilton & Company*, 273 Fed. 596, 598 *et seq.* (Ohio), in which the court recognizes that Section 11828 makes mandatory an affidavit containing a positive allegation that the plaintiff "does believe."

Likewise it has been held, in construing the analogous Section 11820, that the affidavit is 'fatally defective if it fails to state that the action was founded on contract or judgment' (*Pope vs. Hibernia Insurance Company*, 24 O. S. 481); or if it fails to allege that the claim sued upon is just, or fails to state the amount which affiant believes he ought to recover (*Endel vs. Leibrock*, 33 O. S. 254; *Cook vs. Olds Gasoline Engine Works*, 19 O. C. C. 732); or if it fails to set forth the nature of plaintiff's claim (*Driscoll vs. Kelly*, 5 O. N. P. 243); or fails to state when the claim will become due (*Mansfield Savings Bank vs. Post*, 22 O. C. C. 644); or fails to negative the exception in favor of foreign corporations found in Section 11819 (*Dillon vs. Carlisle Garment Company*, 5 App. 347); or fails to positively allege the fact of defendants' non-residence, merely alleging affiant's belief in that regard (*Edwards Manufacturing Company vs. Ashland Sheet Mill Company*, 11 O. C. C. (N.S.) 479).

Thus, it is the settled law of Ohio that the form and contents of the affidavit, pursuant to which the order of



attachment is issued, must comply with the provisions of the statute pursuant to which the affidavit is filed. Hence, the affidavit in this case is fatally defective, not only for failing to comply with the statutory requirement of an allegation that plaintiff "does believe," but also for failing to comply with the statutory provision requiring that the affidavit *describe the property* sought to be attached.

It is indisputably established in Ohio that if the affidavit is improper, incomplete or insufficient, any writ of attachment based thereon is a nullity and void (*Endel vs. Leilrock*, 33 O. S. 254; *Pope vs. Hibernia Insurance Co.*, 24 O. S. 481).

As is said by the Supreme Court of Ohio in *Leavitt vs. Rosenberg*, 83 O. S. 230:

"\* \* \* The proceedings in attachment are statutory remedies, and it is too well settled to need the citation of authorities that where a statute confers a right or gives a remedy unknown to the common law that the party asserting the right, or availing himself of the remedy, must in his pleadings bring himself or his case, clearly within the statute. \* \* \*" (P. 239.)

Clearly it is no answer to such authorities as these to say, as petitioner does at pages 28 to 31 of his brief, that the attachment statutes are remedial and are to be liberally construed. This means that substantial *compliance* is sufficient, not that the plain provisions of the statutes may be disregarded or deliberately flouted as in this case.

We submit that the affidavits filed in the State Court were fatally defective by reason of their failure to comply with the statutes requiring the affiant to state that "he does believe" and requiring the affidavit to con-

tain the description of the property sought to be attached, and hence the attempted proceedings in the State Court were null and void.

**(b) The Affidavit for Attachment Was Verified Before a Notary Who Was an Employee and Attorney of the Petitioner (a Banker and Broker), and Hence Not Qualified to Act as Such.**

There are two provisions of the Ohio statutes which are applicable, and under each of them the notary before whom respondent swore to the affidavit of attachment was disqualified to act. One of these provisions is found in Section 11524, O. G. C., which in turn refers to Section 11532, O. G. C. These sections are as follows:

11524: "An affidavit may be made in \* \* \* this state before any person authorized to take depositions. \* \* \*"

11532: "The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding."

Under these two sections it, therefore, appears that the question is, "Was the notary qualified to preside at the taking of depositions in this case?" If he was not qualified to preside at the taking of depositions, then he was not qualified to take petitioner's affidavit. This question, in turn, depends upon the questions, was he an attorney of the petitioner, or was he "otherwise interested in the event of the action or proceeding;" if depositions were taken?

It appears in the testimony of the notary, D. W. Drennan, that he was a member of the bar of Ohio and

of the Federal District, and that since his admission to practice in 1916, he had been employed by a partnership in which plaintiff was a partner, or by its successor corporation, of which plaintiff was president. He testified (R. p. 64), "I handle some private practice on my own in addition to my work with Spitzer-Rorick & Company and Mr. Rorick \* \* \*. I do some work for the Spitzer Rorick Trust & Savings Bank \* \* \*. *My principal occupation is in the office of Spitzer Rorick, Inc., or Spitzer Rorick & Company, its predecessor.*" He said he had appeared in court for Spitzer Rorick & Company. Thus it appears that he was an "attorney of the plaintiff," although he was not his attorney in this particular case. It also appears that if he had attempted to act as the presiding magistrate at the taking of depositions in this case, that he would have been interested "in the event of the proceeding," for as such presiding magistrate it would have been his duty to "pass upon the witness' privilege," *Bevan vs. Krieger*, 289 U. S. 459, 464, if the witness claimed that certain testimony was privileged, and "to pass in the first instance upon the propriety of a witness' refusal to answer." *Bevan vs. Krieger*, page 464. If Drennan's employer, the petitioner herein, or any other person, had been a witness upon the taking of such depositions and had refused to testify or produce certain papers, it would have been Drennan's duty to decide in the first instance whether or not such witness should be required to produce such papers or give such testimony, and if he ordered him to answer or to produce and the witness refused, then it would have rested with Mr. Drennan to determine whether or not he would order the witness committed for contempt. Obviously,

Mr. Drennan in such case would have been interested in the event of the proceeding, for if he had committed his employer to jail for contempt, or forced any other witness to answer over his employer's objection, he might reasonably have anticipated that the result would have been his discharge from his general employment by Mr. Rorick and Mr. Rorick's companies. It would, we submit, be a very careless and overly trustful lawyer who would entrust to a notary who was entirely dependent upon the opposing party for his livelihood the question as to whether such party or his witnesses should be compelled by contempt proceedings to answer questions or produce papers against his will.

The question here is not one of due process arising out of a direct pecuniary interest on the part of the magistrate, as in the case of *Tumey vs. Ohio*, 273 U. S. 510, 523. See also *Bevan vs. Krieger*, 289 U. S. 459, 465. It is a matter of interpretation of state legislation of which this court said in the *Tumey* case:

"\* \* \* Thus matters of kinship, *personal bias, state policy, remoteness of interest*, would seem generally to be matters merely of legislative discretion. \* \* \*" (P. 523.) (Italics ours.)

However, this case seems to come well within the language of the court in the *Tumey* case at page 532 that:

"\* \* \* Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or *which might lead him not to hold the balance nice, clear and true between the state and the accused*, denies the latter due process of law." (P. 532.) (Italics ours.)

Certainly the average man whose livelihood is and has been for many years absolutely dependent upon the will of one party to an action is in no position to "hold the balance nice, clear and true" between him and one sued by him in deciding the important questions which come before a notary presiding at the taking of depositions in Ohio. As stated by the district judge (R. 49), "I think he was sufficiently interested in any matter in which Mr. Rorick had a personal interest to disqualify him from presiding impartially at the taking of depositions. I do not think the courts should pronounce their benediction upon a practice which would permit one circumstanced as was Mr. Drennan to preside at the taking of depositions."

In *Rhineland Paper Company vs. The Pittsburgh Mining Company*, 15 O. C. C. (N.S.) 286, cited by petitioner (Brief, p. 26), the court, while holding that the attorneys' clerk was not disqualified (which we submit is a decision which is subject to grave question) expressly said:

"\* \* \* the attorney of a party may not act in taking a deposition or affidavit. \* \* \*." (P. 287).

We submit that the District Court was entirely right in so ruling. Certainly the District Court's finding in that regard is not unsupported by evidence, and the weight of the evidence, we understand, will not be reviewed by this court.

*Vicksburg etc. Ry. vs. Anderson-Tully Co.*,  
256 U. S. 408-415.

*Fleischmann vs. U. S.*, 270 U. S. 349, 355-356.

The second section under which the notary was disqualified is Section 121, O. G. C., which reads as follows:

"No banker, broker, \* \* \* or clerk of a bank, banker or broker, or other person holding an official relation to a bank, banker, or broker, shall be competent to act as notary public in any matter in which such bank, banker, or broker is interested."

The plaintiff was a banker and a broker. The Spitzer-Rorick Trust & Savings Bank bears his name. Spitzer-Rorick & Company, the partnership, now incorporated as Spitzer-Rorick, Inc., were municipal bond brokers, and plaintiff himself was a broker, being president of Spitzer-Rorick, Inc., and Drennan was a law clerk in the employment of these brokers. (R. 62.) Mr. Rorick was engaged with his partnership "in the marketing and selling of investment securities" (R. 67), particularly as a dealer in municipal bonds (R. 62). "A broker is \* \* \* a dealer in money, bills, notes of exchange, commodities, etc., a dealer in negotiable securities, especially stocks and bonds, such as are dealt in by stock exchanges, especially in England \* \* \*." (Webster's New International Dictionary.)

Section 121 sets forth what is clearly a matter of "state policy," such as is referred to in the *Tumeij* case. The state has designated what persons may act as notaries in the taking of affidavits, and has placed limitations upon the right so to act. For example of the application of Section 121, see *Ohio Merchants Trust Co. vs. Conrad*, 42 O. A. 150, 181 N. E. 274, wherein it was held that the interest of a trust company as an unsecured creditor of an estate of a testator was such an interest



that a certain employee of the bank was disqualified from acting as a notary public on the widow's election to take under the will in such estate.

When a person who is prohibited from acting nevertheless undertakes to act, the result is the same as though no action had been taken. It is a nullity. The so-called affidavits for attachment were, therefore, not affidavits. They were in legal effect unverified papers, and afforded no warrant for the issuance of any attachment. *Leavitt vs. Rosenberg*, 83 O. S. 230. Consequently the state court could not and did not acquire jurisdiction over any property of the respondent.

**(2) THE ATTACHMENT WAS NOT ISSUED AS REQUIRED BY SECTION 11,819, OHIO GENERAL CODE, "AT OR AFTER" THE COMMENCEMENT OF THE ACTION BUT WAS ISSUED BEFORE IT HAD BEEN COMMENCED BY THE FIRST PUBLICATION OF NOTICE TO DEFENDANT.**

Section 11,819, Ohio General Code, provides, so far as is pertinent:

"In a civil action for the recovery of money, *at or after its commencement*, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:

"1. \* \* \* that the defendant \* \* \* is a foreign corporation."

"2. Is not a resident of this state;" (Italics ours.)

The grounds of the present attempted attachment in the state court were that the defendant Devon Syndicate, Limited, was a foreign corporation and Singer was a non-resident. The petitioner filed, simultaneously with his

petition in that court (R. 2), his affidavit for attachment, based on these grounds (R. 12). Petitioner went through the motions of having a summons issued and returned not found (R. 8), but it was known by all concerned from the beginning that this was a futile formality, as was shown by the grounds for attachment set forth in petitioner's affidavit. Although he knew and had shown to the court by his affidavit that service of process could not be had upon the defendants otherwise than by publication, *he nevertheless attempted to have the sheriff seize defendant's property, immediately, while refraining for four months from beginning publication of notice.*

Petitioner claims that the mere filing of a petition and the issuance of a futile and unserved summons constitutes the commencement of an action within the meaning of those words, as used in Section 11,819. Respondent contends that such proceedings amount only to an attempt to commence an action. The petitioner relies upon Section 11,279 Ohio General Code, which states:

"A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

Respondent relies upon Section 11,230, Ohio General Code, which provides:

"An action shall be deemed to be commenced within the meaning of this chapter, as to each defendant, at the date of the summons *which is served on him* or on a co-defendant who is a joint contractor, or otherwise united in interest with him. *When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication, if it be regularly made.*" (Italics ours.)

Petitioner claims that no attention should be paid to the clear and precise definition of what constitutes the commencement of an action, found in Section 11,230, because that section is included in a chapter of the Ohio Code which is entitled, "Limitation of Actions" (Chapter 2, Title IV), but petitioner overlooks other provisions which are also found in this same Chapter 2, and which, considered with Section 11,230, clearly establish that compliance with Section 11,279, the section relied upon by petitioner, amount to no more than an *attempt* to commence an action if the summons issued in pursuance thereof is not served. Such other sections in Chapter 2 demonstrate that Section 11,230 is not narrowly restricted in its operations by the words, "within the meaning of this chapter."

Section 11,218, Ohio General Code, which is the first section in Chapter 2, states that a civil action

"\* \* \* *can be commenced only* within the period prescribed in this chapter. \* \* \*" (Italics ours.)

Of this section the Supreme Court of Ohio has said:

"It would seem that, under the provisions of our code of civil procedure, it was the intention of the legislature to prescribe a limitation *for the commencement of all* actions in this state. \* \* \*" (Italics ours.)

*Doyle vs. West*, 60 O. S. 438-444.

It will be observed that Section 11,218 provides that an action "*can be commenced only* within the period prescribed" in Chapter 2, and its provisions are not limited to the purposes of the chapter. It applies broadly to all actions and for all purposes. Therefore, when we find

that Section 11,230 prescribed what is the commencement of an action, "within the meaning of this chapter," we find that we have a definition which is applicable for all purposes. This is, we submit, clearly demonstrated by combining Sections 11,218 and 11,230, and reading them together as follows:

"A civil action \* \* \* can be commenced only within the period prescribed by this chapter. An action shall be deemed to be commenced at the date of the summons which is served on the defendant. \* \* \* When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication, if it be regularly made."

Thus it will be seen that the words, "within the meaning of this chapter," in Section 11,230, relate that section to Section 11,218, and when so related it is found that the action can be commenced for *any* purpose *only* by complying with the provisions of this chapter. We reach the same point by changing Section 11,230 to read, and its language certainly necessarily includes such a reading:

"An action shall be deemed to be commenced within the meaning of Section 11,218," etc.

Manifestly, if the action can not be commenced at all except as permitted by this chapter, it is senseless to claim that Section 11,279 permits its commencement *otherwise* than as permitted by this chapter. The argument on behalf of petitioner leads to the strange result that *for the purpose of permitting an attachment*, an action shall be deemed to have been commenced upon the filing of a petition and the issuance of a futile summons never served upon anyone, but for the purpose of deter-

mining whether the Statute of Limitations has been tolled, it shall not be deemed to have been commenced until the first publication of notice to the defendant where publication is proper.

Thus if the filing of a petition and the issuance of the futile summons were within the limitation and the first publication were without the limitation, it would result, according to petitioner's contention, that there would be a valid attachment, although no action had been commenced and none could be commenced, and hence no judgment could be obtained because the period fixed by Chapter 2 had expired.

It is evident that the statutes of Ohio were not intended to lead to any such nonsensical result. They fall into harmony immediately upon observing that Section 11,230 defines what shall constitute the commencement of an action, whereas Section 11,279 does not attempt to do this, but merely states the *initial* steps which must be taken in getting an action under way. It does not attempt to state when the "commencement of the action" shall be deemed *complete for any purpose*. It provides that a petition must be filed and a summons must be issued if an action is to be commenced, but it does not state that so doing will amount to the "commencement" of an action. This is recognized by the court in its opinion in *Royal Indemnity Company vs. Agrios*, 7 O. O. 272, cited three times by petitioner (brief pp. 6, 7, 11). That court after quoting Section 11279 said:

"The succeeding sections give *further* steps and *prerequisites* for the . . . *completion or perfection of the commencement of an action.*" (Italics ours.) (P. 273.)

We must look to Section 11,230 for the true rule and there we find that if the summons is served the action shall be "deemed to be commenced . . . at the date of the summons," if within the period fixed by Chapter 2, but if service by publication is necessary it shall be, "deemed to be commenced at the date of the first publication," if within the period fixed by Chapter 2.

Of course there could be no proper publication if *nothing* had been filed in court. Section 11,279 merely prescribes what the first steps must be in commencing an action, but does not state that such steps alone shall constitute the commencement of an action, so as to permit an attachment to issue under Section 11,819.

A consideration of Section 11,231, Ohio General Code, which is in the same chapter with Section 11,230, further demonstrates that petitioner's claim based on Section 11,279 is wrong. Section 11,231 provides:

"Within the meaning of this chapter, an attempt to commence an action shall be deemed to be equivalent to its commencement, *when the party diligently endeavors to procure a service*, if such attempt be followed by service within sixty days." (Italics ours.)

Thus, one who, in pursuance of Section 11,279, files a petition and causes a summons to issue, *which is not served*, notwithstanding a diligent endeavor to do so, will not have "commenced" an action, but will have made, under Section 11,231, "an attempt to commence an action." In this case petitioner attempted to commence an action by filing a petition and causing summons to issue, but the summons was not served and thus the attempt to commence an action failed. Petitioner, however, with-



out having commenced an action, nevertheless had his attachment issue and then waited about four months before beginning publication of notice. Thus the order of attachment in the action was not issued as required by Section 11,819, "at or after its commencement," but was issued at a time when petitioner had attempted to commence it and had failed in the attempt. According to petitioner's contention, an attempt to commence an action should be treated as the legal equivalent of the proper commencement of it, without any time limitation, regardless of the provisions of Section 11,231, which require that an attempt to commence an action

"\* \* \* shall be deemed to be equivalent to its commencement, when the party diligently endeavors to procure a service, *if such attempt be followed by service within sixty days.*" (Italics ours.)

Under petitioner's claim that he might wait four months, it would follow that he might wait four years or 40 years after having made his abortive attempt to commence an action, and during all such time that he would have a valid attachment, notwithstanding the lack of notice or any attempt to give notice to the defendant and notwithstanding the statute of limitations might bar the action in the meantime. Manifestly, this can not be the rule. An order of attachment binds the property attached from the time of service. Section 11,837. This, of course, means a valid attachment, and clearly can not mean that property of the defendant may be bound by an attachment obtained before the commencement of any action. Due process requires notice and hearing.

*Coe vs. Armour Fertilizer Works*, 237 U. S.  
413, 424-425.

To say that defendant's property may be bound and held indefinitely without any notice to defendant is to say that his property may be seized and held without due process.

When property is garnisheed in Ohio it is provided that the

“ \* \* \* garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is served with the written notice hereinbefore mentioned. \* \* \* ” (Section 11,837, Ohio General Code.)

Further, suit may be brought against the garnishee if he fails to answer or if his answer is not satisfactory to the plaintiff. Section 11,851. Such suit against the garnishee may proceed to the point of a finding of the existence of indebtedness from him to the defendant (although not to final judgment against him) *before* judgment is entered against the defendant in the attachment proceeding. Section 11,853. *Olcott vs. Guerinck*, 19 C. C. 32, 10 C. D. 131. If plaintiff's property has been seized, or the cost of holding the property is excessive, the court may order it sold. (11843 O. G. C.) Under petitioner's claim as to the proper procedure, all of these proceedings could go forward without the publication of any notice to the defendant in the original case or any opportunity for him to learn of what was going on. Clearly this cannot be the proper rule. Furthermore, under Section 11,848, the garnishee may pay the money into court and be *discharged from liability to the defendant*. Manifestly this would deprive defendant of his property without due process unless notice had been given to him of the pend-

ency of the proceeding. Ohio has recognized this by providing as herein shown that the first publication must precede, or be simultaneous with, the attachment.

We have gone at some length into this discussion of the proper construction of the Ohio statutes for the reason that there is no decision of the Supreme Court of Ohio which directly considers and decides the *precise* question which is now under discussion and because there is some conflict among the lower courts. In *Royal Indemnity Company vs. Agrios*, 7 O. O. 272 (1936), cited by petitioner (brief p. 6) the Common Pleas Judge said:

"So far as counsel and the court have been able to ascertain a direct decision on this question has never been reported." (P. 272.)

However, there are a number of decisions of the Supreme and other courts of Ohio which show that the Circuit Court of Appeals in the present case properly construed and gave effect to Section 11,230.

In *Lambert vs. Sample*, 25 O. S. 336, the question before the court was whether any action had been commenced in which defendant *could* enter an appearance, the attempted service of summons on the defendant not having been in accordance with law. *No question of the Statute of Limitations was involved.* The court applied that part of Section 11,230 of the Code, which reads:

"An action shall be deemed to be commenced within the meaning of this chapter, as to each defendant, at the date of the summons which is served on him \* \* \*."

and said:

"Under the provisions of Section 20" (now Section 11,230) "of the Code the action can not be deemed to have been commenced,"

and affirmed an order reversing a judgment for plaintiff. Thus the Supreme Court of Ohio applied the section just as was done by the court below in the case at bar.

In *Totten vs. Lawton*, 4 C. D. 518; the Circuit Court of Hamilton County referred (page 380) to R. S. 4987 (now O. G. C. 11,230) and held that section was the determining factor on the question when an action was commenced where the issue was, as to which of two actions in different courts had been commenced first. No question of statute of limitations was involved.

The same use of Section 20 (11,230) was made in the same kind of an issue by Mr. Justice McLean in *Bell vs. Ohio Life and Trust Company*, Fed. Cases 1260, 1 Biss. 260. He shows very clearly that the mere filing of a petition and issuance of a summons does not constitute the commencement of an action in Ohio, and said:

“\* \* \* The other indispensable requisite, the service of the process, and the date of that service, to give jurisdiction of the subject matter of the controversy, seem to be indispensable. \* \* \*”  
(P. 112.) (Italics ours.)

In *Smith vs. Whittlesby*, 19 C. C. 412, 10 C. D. 377-379, the Circuit Court of Lucas County held that it was not necessary to have a summons issued and returned “not found,” when the defendant was known to be a non-resident. The court said in part:

“\* \* \* To issue a summons is for the purpose, certainly, of notifying the defendant; to serve him in a certain manner, as the statute has pointed out. But, if he is beyond the jurisdiction of the court and cannot be served, that formality is idle. If this is known in advance, it is clear, in our judgment, that a party may file an affidavit in the first instance, with his petition, for the purpose of ob-

taining service. We think it is then a pending suit. *It is a pending action when it has been served upon him, or, if it has been published it is a pending action.*" (P. 417.) (Italics ours.)

The court necessarily based this holding upon R. S. 4987 (now Section 11,230) and here again no question of the Statute of Limitations was involved.

In *Larwill vs. Burke*, 19 C. C. 449, affirmed by the Supreme Court of Ohio without opinion, 66 O. S. 683, the court discusses the decision in the case of *Smith vs. Whittlesby*, *supra*, and says:

"... But if we were to follow that decision, we would find ourselves met by another trouble.

"There was no affidavit filed in the case *to obtain service by publication*; these steps both being required by the statute, and *both being conditions precedent to the court taking jurisdiction either of the person or of the property.*

"We can not say that they can be overlooked.

"And we hold that no jurisdiction was had in the case, either over the person of the defendant, or the property that was subjected to the attachment proceedings and sold by the court." (P. 470.) (Italics ours.)

Issuance of an attachment does not constitute the commencement of an action. It is auxiliary to an action which must have been already commenced or there can be no attachment. *Seibert vs. Switzer*, 35 O. S. 661, 665.

In *Seibert vs. Switzer* the attachment was issued several hours prior to the filing of the petition, which was filed later on the same day. The Supreme Court held that the attachment was void as it had issued before the action had been commenced. In the case of *Doherty vs. Cremering et al.*, 83 Fed. (2nd) 388, which the court be-

low followed in its decision in the case at bar, the court applied the rule of *Seibert vs. Switzer*, holding that the beginning of publication is just as essential a part of the commencement of an action under Section 11,230 as is the filing of the petition, and, hence, that *an attachment prior to publication is just as defective as one prior to the filing of the petition.*

There is one case in Ohio, *Bacher vs. Shawhan*, 41 O. S. 271, decided by the Supreme Court Commission, which petitioner claims is in point and opposed to the decision of the court below in the case of *Doherty vs. Cremering*. In fact, however, the question now under discussion was not presented to the Supreme Court Commission or decided by it. As is pointed out by the court below in *Doherty vs. Cremering* the commission made no reference to Section 11,230 (then Section 4987 R. S.) in its opinion. Section 11,218 and the other relevant sections hereinbefore discussed were not called to the attention of the commission. The commission in no way considered or passed upon the question which was decided by the court below in *Doherty vs. Cremering* and followed by the court below in this case as to the effect of Section 11,230 in connection with attachment actions. The opinion of the commission in *Bacher vs. Shawhan*, shows, page 272, that the argument presented to it was that the court below had "lost jurisdiction because the attempt to commence the action was not followed by service within 60 days" as required by Section 4988 R. S. (now Section 11,231, O. G. C.), in response to which the court said:

"We are not aware of any statutory provision ousting the jurisdiction for plaintiff's delay or neglect." (Italics ours.)



Thus it appears that what the commission was considering and all that it decided was whether the court below had *lost jurisdiction* because of *plaintiff's delay or neglect*. The question whether the court below *had ever acquired jurisdiction* was not presented to the commission. A reading of the opinion demonstrates that this question was in no way passed upon or considered by it. Whether the attachment had been issued "at or after the commencement of the action" was not discussed or even noticed by the commission. (But note that the commission spoke of the *filing* of the petition and the issuance of the futile summons as "the *attempt* to commence the action.") (Italics ours.) The question which is now here *might* have been raised and decided in that case but it was not. The apparent conflict relied upon by respondent between the decision of the Supreme Court in *Bacher vs. Shawhan*, and the decision of the court below in this case, upon analysis of *Bacher vs. Shawhan*, is, therefore shown to be non-existent. The cases were presented, argued and decided upon entirely different theories. The decision is not a precedent upon a point which might have been, but was not, presented to and decided by the court.

Petitioner cites several lower court decisions in Ohio which are in conflict with the decision of the Ohio courts hereinbefore cited. The clear weight of authority in Ohio, however, supports the ruling of the court below in this case and in *Doherty vs. Cremering*.

The attachment in the case at bar, having been prematurely issued, and being a nullity when issued, of course, could not have new life breathed into it by the subsequent publication of notice. This is made clear by

the decision of the Supreme Court in *Pope vs. Hibernia Ins. Co.*, 24 O. S. 481, in which the court said, at page 485:

"\* \* \* The attachment previously issued being a nullity, no jurisdiction could be acquired under it by subsequent amendment. The amendment merely made a case which authorized proceedings to acquire jurisdiction. It did not quicken that which was without legal vitality, and confer jurisdiction by virtue of what has been done without any bases of legal authority.

"Amendments, where the court obtains no jurisdiction, are of no avail. \* \* \*" (Pp. 485, 486.) (Italics ours.)

A recent lower court decision in harmony with the holding of the Circuit Court of Appeals in this case is *Bear vs. Old Tyme Distilleries, Inc.*, 5 Ohio Opinions 530 (Court of Common Pleas of Franklin County), in which it was held:

"Where, at the time a petition in an action for money judgment was filed, an affidavit for constructive service and an affidavit for attachment and garnishment were filed and orders for garnishment and attachment issued on the same date, notice being published four days later, there being no summons issued in the case, under the provisions of Section 11,230, General Code, the action was not commenced until the first publication of the notice, and the attachment was void under Section 11,819, General Code, providing for an attachment at or after the commencement of the action." (Syl.) (Italics ours.)

The fact that no summons had been issued in the case last cited, although mentioned in the syllabus, is, we submit, of no importance under the decision of the Circuit Court of Lucas County in *Smith vs. Whittlesey*,

*supra*, to the effect that no summons need be issued in a case like that at bar where it is known in advance that it is impossible to serve it.

In the case of *Cleveland and Western Coal Co. vs. J. H. Hillman and Sons Co.*, 245 Fed. 200, Judge Westenhaver, sitting in the District Court for the Northern District of Ohio, held:

“ \* \* \* Under the Ohio law, an action is pending, so as to stop the running of the statute of limitation from the time process is issued, only when actual service is made within 60 days thereafter. General Code, Sections 11,230, 11,231? An attachment can be issued only at or after the commencement of an action. General Code, Sections 11,279, 11,280.” (P. 203.)

There is no merit to the petitioner's claim (brief p. 12) that under the rule, followed by the lower court herein, the attachment must (although of course it may) be levied on the day of the first publication. That court did not hold that the publication must *precede* the attachment. Under the rule stated by it (R. 96) the attachment may *accompany* or follow the first publication but must not *precede* it.

It is respectfully submitted that the great weight of authority in Ohio is in favor of the application of Section 11,230 in the manner in which it has been applied by the Circuit Court of Appeals in the case at bar. In practice there is not the slightest difficulty in following it, as is being demonstrated every day.

- (3) **THE SHERIFF'S RETURN OF THE ORDER OF ATTACHMENT WAS INSUFFICIENT IN THAT IT FAILED TO STATE THE NAMES OF THE GARNISHEES, AND THE TIME EACH WAS SERVED, AS REQUIRED BY SECTION 11,836 OF THE OHIO GENERAL CODE, AND THERE IS NO SHOWING THAT THE ORDER OF ATTACHMENT WAS SERVED ON THE GARNISHEES AS REQUIRED BY SECTION 11,833.**

As hereinbefore stated but one order of attachment (R. 6) was issued by the state court, and hence, but one return of such order was made by the sheriff (R. 9). This return was made on June 23, 1930. It reads in its entirety as follows:

"Received this writ June 19, 1930, and there being no goods or chattels, lands or tenements found by me in Lucas County, Ohio, belonging to the within named Devon Syndicate, Ltd., et al., on which to levy, this writ is hereby returned, no money made, not satisfied."

The statute dealing with the return to be made on the order of attachment is General Code Section 11,836. Its terms are mandatory and most specific. The pertinent part of the section is as follows:

"The officer shall return upon every order of attachment what he has done under it. The return must show the property attached and the time it was attached. *When garnishees are served their names and the time each was served MUST be stated. \* \* \**" (Emphasis ours.)

It has been specifically held that the provisions of Ohio General Code Section 11,836, quoted above, are man-

datory and must be complied with to secure a valid attachment. *Green vs. Coit*, (1909) 81 O. S. 280:

"Section 5537, Revised Statutes, which provides that 'the officer shall return upon every order of attachment what he has done under it, and the return must show the property attached,' makes it necessary that the return shall show all the essential things the officer has done in the execution of the writ, and shall so describe the property as to identify it.

Section 5537 of the Revised Statutes referred to is now Ohio General Code Section 11,836 quoted *supra*.

It did not appear in the case just cited whether the sheriff had in fact complied with the requirement of leaving a copy of the order of attachment with the occupant or posted in a conspicuous place on the premises. However, the court cited with approval authority for the proposition that *compliance in fact was immaterial if it was not shown in the return*. In this connection we note that petitioner claims that copies of the orders of attachment were in fact left with the garnishees and refers the court to page 44 of the record. There is no evidence on that page or anywhere else in the record that the sheriff did any such thing.

Another case recognizing the mandatory provisions of Ohio General Code Section 11,836 is *Weirick vs. Lumber Company*, (1917) 96 O. S. 386. This case involved the priority of various attachments and the court held that compliance with the provisions of Section 11,836 as to what the return on the order of attachment must show were mandatory and if not followed the purported attachment was void and of no effect. The court said, page 396, that the return must show the property attached

and the time it was attached and that this "brings the property within the custody of the court, unless there are garnishees, when that fact *must* also appear in the return, agreeable to the statute." (Italics are the court's.)

Petitioner claims (brief P. 35) that the *Weirick* case holds that it is not necessary for the return to show that a copy of the order was left with the garnishee. As just shown, it holds the opposite by reason of the express requirement of Sec. 11836. What it holds the return need not show is that a copy of the order was left "with the owner or occupant" of attached real estate, as Sec. 11836 does not require that the return show this fact.

Under the foregoing authorities it is the settled law of Ohio that the return *on the order of attachment* must show a strict compliance with the mandatory provisions of General Code Section 11,836 and as that statute provides, *must* show the names of the garnishees, that they were served with the *order of attachment*, and the time that each was served, *none of which requirements was met in the return on the pretended order of attachment in the instant case*. Therefore, the pretended order of attachment and the pretended garnishments in the state court based thereon were unlawful and invalid.

The petitioner's claims that the sheriff's return on the *order of attachment* should be supplemented by, and read in connection with, the endorsements which the sheriff placed upon the "Notice to Garnishee" (R. 14) and that if these two are read together and *treated as though they both constituted the sheriff's return upon the order of attachment* that it will *then* appear that the sheriff did comply with Section 11,828 and did state in his



return of the order of attachment the names of the garnishees and the time each was served with the order.

The difficulty with this argument is that it merely amounts to saying that if the sheriff *had* included in his return of the order of attachment something which he did *not* include therein, that *then* it would appear that he had carried out the mandatory provision of Section 11,828.

The endorsement which the sheriff placed upon the "Notice to Garnishee" is not called for by any statute and the endorsement on the Notice to Garnishee of what the sheriff has done with it is entirely unauthorized. The notice to garnishee is not the writ of attachment. The writ of attachment is the *order* of attachment and it is upon the *order* of attachment that there "*must* be stated" what, if anything, the sheriff has done under it. The sheriff's endorsement upon the notice to garnishees is a mere stray paper. It has no effect, whether it be lodged in the clerk's office or held by the sheriff, or never made at all.

Authorities such as are cited in petitioner's brief, page 36, to the effect that, an inadvertent-omission of a few words from one *authorized and required* return may be helped out by another *authorized and required* return of an officer made *simultaneously* are not here in point. They would be in point only if they held that an authorized but defective return may be treated as free from defect if the officer, *not* acting within the scope of any authority conferred upon him by law, has made, *aliunde* the record, some seven days later a correcting statement. But this is not the law of Ohio. In *Root vs. Railroad Company*, 45 O. S. 222, the Supreme Court of Ohio had occasion to

pass upon the legal effect of an unauthorized statement by a sheriff in a return of execution that he had:

"\* \* \* levied it upon certain property *subject to the attachment of Root & Co., \* \* \**" (P. 231.) (Italics ours.)

The court said that part of that statement which we have italicized

"\* \* \* was not a necessary part of his return on that writ; \* \* \*" (P. 231.)

and

"\* \* \* it is well settled that the return of an officer is conclusive as to such parties and privies *only as to such facts as it was his legal duty to state. \* \* \**" (P. 232.) (Italics ours.)

and further said:

"\* \* \* A return upon a writ properly embraces no more than a pertinent history of what was done by the officer in executing it according to its requirement; and where it is made to include matters outside of such history, *the matters so incorporated constitute no part of the return*, and are not evidence even as between parties, much less as between strangers." (P. 232. ) (Italics ours.)

So here, where the sheriff made what he called a return upon the Notice to Garnishee, he was doing something which was unnecessary under the requirements of the statutes and which he was wholly unauthorized to do, and, hence, the endorsement on the notice is not evidence of anything as between the parties and can not be engrafted on the return of the order of attachment.

Furthermore, Section 11,833, Ohio General Code, provides that the order of attachment shall be served upon the garnishee. The first sentence of the section reads:

"If the garnishee is a person, *a copy of the order and notice shall be served upon him personally, or left at his usual place of residence.* \* \* \*"  
(Italics ours.)

The mere service of notice upon the garnishee is not sufficient. The "Sheriff's Return," endorsed on the Notice to Garnishee, even if it could be read in connection with the sheriff's return on the order of attachment, would still fail to cure the defect in the latter for his so-called return endorsed on the Notice to Garnishee (R. 11), merely states that he has delivered to the garnishee, "a true and certified copy of *this writ with all endorsements thereon.*" Manifestly by the use of the words, "this writ," he was referring to the Notice to Garnishee upon which the return was endorsed and not to the order of attachment. Therefore, even reading the two returns together, it affirmatively appears that the order of attachment was not served upon the garnishees as required by Section 11,833 and that all that was served upon them was the notice. Thus there is a fatal defect in the proceedings, even though petitioner's request that the two returns be read together could be granted.

In *Ireland vs. Adair*, 12 N. D. 33, 94 N. W. 766, the Supreme Court of North Dakota, under statutes similar to the Ohio statutes, had before it the question, as to whether an attachment was valid where the order of attachment had been served upon the garnishee but the notice to garnishee had not been served, *service of both being required in that state, as in Ohio*, under Section 11,833. The Supreme Court of North Dakota held:

"The judgment entered in this case is void for want of jurisdiction in the court to enter it;  
\* \* \*." (Syl. 3.)

In the opinion the court said, in part:

" \* \* \* The property here sought to be subjected to the lien of the attachment was a debt due to the defendant, and, under the imperative requirements of the statute, could only be attached in the method indicated. The proceedings by attachment are statutory and special, and the provisions of the statute must be strictly followed, or no rights will be acquired thereunder. *Rudolph vs. Saunders*, (Cal.) 43 Pac. 619; *Courtney vs. Bank*, 154 N. Y. 688, 49 N. E. 54; 4 Cyc. 583, 589. Section 5381, Rev. Codes, requires the sheriff, when the warrant of attachment has been fully executed, to return the same, with his proceedings thereon, to the court in which the action was commenced. It is his duty to state in his return what acts he performed in the execution of the warrant, so that the court may decide upon its sufficiency. *We must therefore assume that in his return the sheriff stated all he did toward effecting a levy. Sharp vs. Baird*, 43 Cal. 577; *Watt vs. Wright*, (Cal.) 5 Pac. 91; *Rudolph vs. Saunders*, (Cal.) 43 Pac. 619. The sheriff's return in this case does not show even a substantial compliance with the statute. It does not disclose the service upon Pearson and LaDu, or either of them, of a notice showing the property levied on. *This is fatal to the attachment.* \* \* \* There being no lawful attachment of property in this case, the court was without jurisdiction. \* \* \* " (P. 767.) (Italics ours.)

It is just as imperative under Section 11,833, Ohio General Code, that the order of attachment be served upon the garnishee as that the notice be served upon him. There is no showing in the record that the order of attachment was in fact served on the garnishees. Therefore, the suggestion in petitioner's brief (p. 37) that the sheriff's return may be treated as amended to

show such service is without merit. The return as made is conclusive between the parties, *Phillips vs. Elwell*, 14 O. S. 240. Consequently the proceedings in the case at bar are void for the same reason that the proceedings in the North Dakota case just cited were void.

**(4) THE SHERIFF'S RETURN SHOWED AFFIRMATIVELY THAT NO PROPERTY OF THE DEFENDANT HAD BEEN REACHED OR SUBJECTED TO THE JURISDICTION OF THE COURT AND SUCH RETURN IS CONCLUSIVE AND BINDING UPON THE PARTIES**

Section 11,836, Ohio General Code, provides:

"The officer shall return upon every order of attachment, what he has done under it. The return *must* show the property attached and the time it was attached. \* \* \*" (Italics ours.)

In *Green vs. Coit*, 81 O. S. 280, the Supreme Court held that Section 5537, Revised Statutes, now Section 11,836, Ohio General Code:

"\* \* \* makes it necessary that the return shall show all the essential things the officer has done in the execution of the writ, and shall so describe the property as to identify it." (Syl. 1.)

and further held that a return of an order of attachment which

"\* \* \* fails to so describe the property as to identify it, is insufficient to give to the court out of which the writ issued dominion over the property." (Syl. 2.)

It necessarily follows that when the sheriff's return describes *no* property and says that *he has found no property*, that the court *acquires dominion over no prop-*

erty, and, hence, (there having been no personal service of process), *acquires no jurisdiction over anything.*

“\* \* \* the court in such a suit cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. *A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court.*” (P. 189.) (Italics ours.)

*Freeman vs. Alderson*, 119 U. S. 185-189.

As has been shown in the next preceding section of this brief, the sheriff's return upon the order of attachment is the *only* return which he is authorized to make. Having made a return on that order that “no goods or chattels, lands or tenements” had been found by him in Lucas County, Ohio, “belonging to the within named Devon Syndicate, Ltd., *et al.*, on which to levy,” it necessarily follows that this affirmatively established complete lack of jurisdiction in the state court.

Even if, contrary to the holding of the Supreme Court of Ohio in *Root vs. Railroad Company*, 45 O. S. 222, discussed in the next preceding section of this brief, it were possible to supplement the sheriff's return of the order of attachment by his so-called sheriff's return endorsed on the Notice to Garnishee (R. 11), the situation would still be unchanged for the “return” on the Notice to Garnishee does not show that any property whatsoever was attached. Reading the two returns together we have the sheriff stating that he had served certain persons with notice that they had been garnisheed in the case, but that he had found no goods, chattels, lands or tenements belonging to the defendants in the possession of the garnishees or elsewhere in Lucas County, Ohio.



The words, "goods" and "chattels," include debts, choses in action, stocks, securities, money, etc. See definition of "goods and chattels, Bouvier's Law Dictionary—Rawle's Third Edition, and Black's Law Dictionary.

*Hall vs. State*, 3 O. S. 575;

*Hawkins vs. State Loan & Trust Company*,  
79 Fed. 50;

*Gibbs vs. Usher et al.*, Case No. 5387—10  
Fed. Cases 303.

It is therefore respectfully submitted that under any possible construction of the proceedings of the sheriff and whether or not his two returns be put together and treated as one, he affirmatively reported to the court that he had found nothing and attached nothing. His return, so long as it remains uncorrected and undisturbed by order of court, is conclusive as between the parties to the action. This question was before the Supreme Court of Ohio in the case of *Phillips vs. Elwell*, 14 O. S. 240, in which the court said, in part:

"Notwithstanding some decisions, the weight of authority clearly is, that an official return, duly made upon process by a sworn officer, *in relation to facts which it is his duty to state in it*, is, as between the parties and privies to the suit and others whose rights are necessarily dependent upon it, conclusive as to the facts stated therein, until vacated or set aside by due course of law; . . . ." (P. 244.) (Italics ours.)

The fact that one of the garnishees (being under control of petitioner) has seen fit to file an answer (R. 25-44), in which it asserts that it is indebted to, and holds property of, the defendant is of no importance in the face of the sheriff's return. Garnishees are not parties

and a voluntary appearance and admission of indebtedness, upon the part of a garnishee, obviously can not give the court jurisdiction over the defendant's property if the statutory steps necessary to the creation of an attachment lien have not been taken.

It results, we submit, from the foregoing, that the record affirmatively shows no jurisdiction whatsoever was acquired over any property of the defendant by the state court.

**(5) THE ORDER OF ATTACHMENT AS ISSUED WAS FOR THE JOINT PROPERTY OF THE DEFENDANTS AND THE ONLY PROPERTY WHICH PETITIONER CLAIMS WAS REACHED BY THE ATTACHMENT IS PROPERTY ALLEGED BY THE GARNISHEES TO BE THE SEPARATE PROPERTY OF THIS RESPONDENT.**

We have, we believe, shown in the preceding section of this brief that the record affirmatively shows, in a way binding upon petitioner that *no* property of defendant was reached by the attachment proceedings in the state court. Still standing upon that position, we now show the court that even upon the petitioner's claim that some property was reached, the record affirmatively shows that such claim can apply only to *separate* property of this defendant, whereas the only order of attachment which issued from the Court of Common Pleas (R. 9) commanded the sheriff to attach

"\* \* \* the Lands, Tenements, Goods, Chattels, Stocks, or interest in Stocks, Rights, Credits, Moneys and Effects, in your county, of Devon Syndicate, Ltd., and Paris E. Singer \* \* \*." (Italics ours.)

In the notices to garnishee (R. 10, R. 13) they were required to answer

"\* \* \* touching the property of every description, and credits, of the defendants Devon Syndicate, Ltd., and Paris E. Singer in their possession, or under their control, and they shall disclose truly the amount owing by them to said *defendants*,  
\* \* \*." (Italics ours.)

The order and notice were issued pursuant to affidavits filed by the plaintiff (R. 6, R. 12), wherein he stated that he had good reason to believe the named garnishee had property belonging to "Devon Syndicate, Ltd., and Paris E. Singer." In the affidavit filed six years later in the District Court petitioner, for the first time, referred to the separate property of each defendant, as well as to their joint property, thus tacitly admitting the error in the state court proceedings.

In this connection it is of interest to observe that plaintiff's petition (R. 2) asserts a *joint* liability against Devon Syndicate, Limited, and Paris E. Singer, and "prays judgment against said *defendants*." The action was thus a joint action and the attempt was made only to reach the joint property of the defendants.

The only foundation there can be for petitioner's claim that some property was reached by attachment (despite the sheriff's return that none was reached) is found in the answers of the garnishee (R. 25), in which it alleges that it is indebted to and holds property of the "defendant, Devon Syndicate, Ltd."

We contend that there can be no valid attachment of the *separate* property of one defendant in pursuance of affidavits, order of attachment and notices of garnishment, all of which refer only to property *jointly* owned

by two defendants, and that the attachment would be void even if the sheriff's return had stated what is alleged in the garnishee's answer.

In *Winchester, Irwin & Co. vs. Pierson & Avery*, 1 O. D. Reprint 169, Superior Court of Cincinnati, the court passed upon a motion to quash the return of service and set aside the attachment because the property attached was the individual property of one of the defendants only, while the writ of attachment had been issued against their joint estate. The court said:

"Requiring the creditor to pursue the statute strictly, confining him to its letter, can he attach the separate estate of a joint debtor by a writ issued against the joint estate only? I think not. By so issuing he confines the attachment to the joint estate. 2 West. L. J., 296. If he desires to reach the separate estate, the writ should issue against the separate estate. The writ may issue to attach the property of the defendants, or that of any of them, or property of both descriptions.

"In proceedings under this statute, before jurisdiction attaches to proceed in the cause, it must appear that the defendants are the debtors of the plaintiff, that the defendants have absconded, or are non-residents, and that the property against which the writ issued must be attached. 7 O. R. 259, Pt. 1. The writ in this case, issued against the joint property of the defendants as partners. No such property has been attached. The writ was properly issued; but the officer has failed to find the property against which it issued; and it stands like any other case where process has been issued and not served." (Pp. 170, 171.)

In *Feidler vs. Blow, Owens and Gallespie*, 1 O. D. Reprint 245. (Supreme Court of Ohio, Hamilton County), it was held:

“ \* \* \* where a writ of attachment issues against the joint property of three defendants, the separate property of one cannot be attached. \* \* \* ” (Syl.)

The court said:

“Where two or more are jointly bound, or indebted, the statute authorizes a writ of attachment to issue against the separate or joint estates; or both, or any of them, but in this case the writ issued against the joint property only.

“The writ did not authorize the attaching of the separate property. As no joint property or effects were found, we cannot say that the Superior Court erred in this particular.” (P. 245).

As above shown, it affirmatively appears that the only property which petitioner *claims* was reached by the order of attachment and notice of the garnishee is the separate property of Devon Syndicate, Limited, reported in the answers of the garnishee (R. 25). The record contains no attempt to show even by answers of the garnishees that any property owned by Devon Syndicate, Limited, and Paris Singer was in the possession of anybody in Lucas County, Ohio.

We submit that the writs issued by the Common Pleas Court of Lucas County against the *joint estate* of both defendants did not authorize the attachment or garnishment of the *separate* property of this defendant, and hence the State Court for this additional reason failed to obtain any jurisdiction of the cause.

**(6) THE PUBLICATION OF NOTICE TO THE DEFENDANT IN STATE COURT WAS FATALLY DEFECTIVE IN THAT IT FAILED TO MENTION THAT THE OBJECT OF THE PETITION WAS TO OBTAIN SATISFACTION OF PLAINTIFF'S ALLEGED CLAIM BY ATTACHMENT OF THE DEFENDANT'S PROPERTY**

Section 11,292, Ohio General Code, provides when service may be made by publication. The paragraph of that section here applicable reads as follows:

"Service may be made by publication in any of the following cases:

"7. In an action in which it is sought by a provisional remedy to take or to appropriate in any way property of the defendant, when the defendant is not a resident of this state or is a foreign corporation or his place of residence cannot be ascertained;

Section 11,295, Ohio General Code, provides how the publication must be made and what it must contain. On the latter subject it provides:

"\* \* \* It must contain a summary statement of the *object* and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer." (Italics ours.)

The notice which was published for the defendants in the state court (R. 16) gave them no information whatsoever to the effect that any attachment proceedings had been begun against them or that it was the plaintiff's object to satisfy whatever judgment he might obtain out of



property of the defendants in Lucas County, Ohio. It merely advised them of the filing of the petition and of the amount claimed and of the date they were required to answer.

In a case in which, as here, it is known at the time of filing the petition that the defendants cannot be personally served, as is shown by the simultaneous filing with the petition of the affidavit for the attachment of defendant's property on the ground of non-residence (R. 12, R. 13) it is perfectly clear that the "object . . . of the petition" is to obtain satisfaction in whole or in part of plaintiff's claim, not by personal judgment but by attachment and sale of defendant's property within the jurisdiction of the court. It is, therefore, necessary to a valid publication of notice in such a case, under Section 11,295, Ohio General Code, that the notice advise the defendants of the fact that the action includes proceedings for the satisfaction of plaintiff's claim by attachment of defendant's property. Obviously a mere notice to a non-resident (who knows that no personal service has been or can be had on him) that he has been sued does not call upon him to take any action to protect himself. If he is not notified of the attachment proceedings, he is not placed on notice of anything requiring action on his part.

Petitioner has himself recognized that this is the necessary kind of notice by the notice (Appendix page 89) which he caused to be published in his attempt to secure an attachment in the District Court after removal. (R. 33). By that notice he advised the defendant not only that he had filed his petition, but that he had filed his affidavit in garnishment "on which said affidavit, orders of attachment and notices to garnishees have been

issued by the clerk of said court and served on" the garnishees, naming them "attaching such monies, property and assets of defendant, Devon Syndicate, Limited, and/or defendant Paris E. Singer in their possession and control, due and payable or to become due and payable to either one or both of said defendants, said monies, property and assets being more particularly described in said supplemental affidavit and attachment." Thus again petitioner tacitly admitted the existence of a defect in his state court proceedings in which the notice contained nothing of this character.

Petitioner in his brief herein says (p. 12):

"On theory, the *very purpose of publication is to notify the defendant that his property has been attached.*" (Italics ours.)

The Supreme Court Commission of Ohio held in *Core vs. Oil and Oil Land Co.*, 40 O. S. 636 (1884), that a notice which stated "*that an attachment has been issued in said case*" is sufficient notice without a description of the attached property. The Circuit Court of Hamilton County made the same ruling in *Daniels vs. Taylor*, 13 O. C. C. (N. S.) 116 (1910), saying in explanation, page 118:

"\* \* \* the kind of personal property can be readily ascertained by him by referring to the sheriff's return \* \* \*"

In *Moses vs. McKim*, 2 Western Law Weekly, 15, 2 Ohio Decisions Rep. 180 (1859), the Court of Common Pleas held that a notice which did not "set forth the issuing of an attachment" was insufficient. The court said in part:

“ \* \* \* What, then is the object of the suit? Is it not to obtain a money judgment against the defendant, and an order of sale of the attached property for its payment? As the judgment has no binding force, except as to the attached property, it would, perhaps be better to say, that the object of the suit is to obtain an order for the sale of the attached property, as on execution, and the application of the proceeds to the payment of the amount found due from defendant to plaintiff, on the cause of action in the petition stated. And unless the issuing of an attachment and description of the property attached are inserted in the notice, the true object and design of the petition or action is not stated. Unless these facts are stated, nothing is set forth to show the jurisdiction of the court—nothing showing that the non-resident is bound to appear or make defence. \* \* \* ” (P. 181).

In *Endel vs. Liebrock* 33 O. S. 254, it was contended that the notice was insufficient because (among other reasons) it failed “ \* \* \* to state that an order of attachment was issued in the case”. The court said at page 268:

“Without noticing the other defects apparent on the record, such as the omission of an affidavit for publication, as required by section 71 of the code, or that the notice published was defective, in not stating the court in which the case was pending, and in not stating a summary of the object of the petition, and in being misleading as to the nature of the causes of action and amount sued for, we think the fact that there was not the requisite affidavit to authorize the issuing of the attachment, renders all subsequent proceedings under it void.” (Italics ours).

In *Mares vs. Schuth*, 28 Pac. 2d 527 (1933) (Supreme Court of N. M.), it was held:

"Plaintiff's failure to comply with statute in securing service on principal defendant invalidates judgment as to him and also against garnishee." (Syl. 1).

"Where notice to non-resident principal defendant did not state that his money would be applied and his effects disposed of to pay judgment, court had no jurisdiction to award judgment against money and property of principal defendant in hands of garnishee." (Syl. 3.)

In *Smith vs. Montoya*, 1 Pac. 175 (Supreme Court of N. M.) (1883), it was held:

"In attachment proceedings the statute requires that the citation by publication shall contain a notice to the defendant 'that his property had been attached, and unless he appeared \* \* \* judgment would be rendered against him, and his property sold to satisfy the judgment.' This requirement was not repealed by the acts of 1862 or 1874, and its omission, unless cured by a voluntary appearance, renders the citation void, and no jurisdiction is acquired thereby against the defendant or his property, even in a proceeding *in rem*." (Syl. 3.)

It thus appears that the attempted service by publication in the state court did not comply with the statute, in that it did not advise the defendants of the attachment proceedings and hence gave them no notice of the object of plaintiff's petition. It therefore was void and wholly ineffective and the case stood at the time of removal to Federal Court in exactly the same position as though, *nothing had been done toward commencing an action except to file a petition*. No personal service of summons had been had upon the defendants, no publication which

had the slightest validity had been made, and the attempt to seize defendant's property as a basis of jurisdiction was in clear violation of the Ohio statutes. This attempt was therefore void, as we have shown, and hence the proceedings which petitioner claims to have amended by proceedings in the federal court were a complete nullity from the beginning to the end.

Even if, contrary to the great weight of Ohio authority, it should be held that the order of attachment could validly issue before the first publication of notice, petitioner's claim of jurisdiction in the state court fails because of his failure to include notice of the attachment proceedings in his publication in the state court.

## II

**(1) THE ATTEMPTED ATTACHMENT BY PROCESS OF THE FEDERAL COURT WAS WHOLLY INEFFECTUAL BECAUSE THE STATE COURT PROCEEDINGS BEING VOID AFFORDED NO BASIS FOR AMENDMENT IN EITHER STATE OR FEDERAL COURT. THE FEDERAL ORDER OF ATTACHMENT WAS NOT AN AMENDMENT OF THE STATE ORDER.**

At the outset it should be pointed out that although the petition and affidavit filed in Federal Court were called amended and supplemental, they are not in fact amendments of the proceedings which had been had approximately six years previously in the state court. Petitioner filed in the District Court an entirely new set of pleadings and repeated all of the previous proceedings, including the filing of a new petition, a new affidavit in attachment and garnishment, and a new affidavit for

constructive service, and had issued a new summons for both of the defendants (one of whom was then dead), to notify the defendants, "that they have been sued \* \* \* in the District Court of the United States, within and for the Western Division of the Northern District of Ohio," (R. 86), and had issued a new order of attachment and new notices to the garnishees (R. 37-39). The present record shows no new publication of notice to defendant, but as stated (p. 5 hereof), we are willing to stipulate that a new publication was made beginning after the issuance and service of the attachment.

The new affidavit and garnishment filed in the Federal Court made no reference to any state of facts that existed except as of January 23, 1936, when that affidavit was sworn to. The new affidavit did not purport to show that any state of facts existed in June of 1930 when the petition was filed in the state court, which would or could have warranted the issuance *then* of any attachment. Petitioner also attempted to attach and garnishee a fund of \$17,756.05, *which was not in existence when the petition was filed in the state court.* In his new petition plaintiff changed the prayer to a prayer for judgment, "against said defendants *and each of them,*" thus attempting to change the suit from one asserting a joint liability to one asserting a joint and several liability and by his new attachment and garnishment proceedings he attempted to reach the separate property of each defendant, although, as hereinbefore shown, in the state court he had attempted to reach only the defendants' joint property.

The affidavit (R. 6) and the order of attachment (R. 9) in the state court attempted to deal only with



property of the defendants in Lucas County, Ohio, whereas the order of attachment issued by the District Court (R. 37) commands the marshal to attach the property of the defendants "in your district." The Northern District of Ohio includes many counties besides Lucas County. *The Court of Common Pleas could not have issued an attachment directing the sheriff of Lucas County to attach property in any place other than Lucas County.* Under Section 11,823 "Orders of attachment may be issued to the *sheriffs of different counties,*" but it is perfectly clear that an attachment issued to the sheriff of *Lucas County* could not be amended by commanding him as the sheriff of Lucas County to attach property in any and all counties lying within the Federal Northern Judicial District of Ohio. Thus the form of the attachment alone issued by the District Court is enough to establish that it was not and could not be an *amendment* of the order of attachment issued by the state court, but was a new and independent proceeding.

What plaintiff attempted to do under the guise of filing amended and supplemental pleadings and attachment proceedings was to file a new action asserting a different liability and seeking to reach property in part different from that in the state court proceedings and to reach it in territory outside of that covered by the state court writs. The claim of right to do this is based upon what we believe we have shown to be attempted proceedings in the state court which had completely failed to vest any jurisdiction in that court.

Aside from the question of Federal law involved, hereinafter discussed, petitioner could not have done what he attempted to do even had the case remained in

the state court. The district judge in so ruling, said in part:

"The affidavits filed in the state court, in my opinion, could not be amended by the supplemental affidavit filed in this court. *Leavitt vs. Rosenberg*, 83 O.S. 230, 240, 241. In Ohio the syllabus is the law of the case, and the fourth syllabus of the above case is as follows:

" 'The levy of the order of attachment, based upon an insufficient affidavit, cannot be upheld by an amendment of the affidavit'."

It has been contended by counsel for the petitioner that the Supreme Court of Ohio based its decision in the *Leavitt* case upon two grounds and that it, therefore, is not authority for the proposition contained in the fourth syllabus of the opinion quoted by the District Court in its opinion herein, but this is not the correct rule. This court said, in *United States vs. Title Insurance & Trust Company*, 265 U. S. 472:

"\* \* \* where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court and of equal validity with the other.' *Union Pacific R. R. Co. vs. Mason City & Fort Dodge R. R. Co.*, 199 U. S. 160, 166; *Railroad Companies vs. Schutte*, 103 U. S. 118, 143." (P. 486.) (Italics ours.)

The *Leavitt* case, relied on by the lower court, followed the long settled and well established law in Ohio that an attachment or garnishment issued on an insufficient affidavit is *absolutely void* and can not be validated by any subsequent amendment.

In *Pope vs. Hibernia Ins. Co.*, 24 O. S. 481, the affidavit was defective in that it failed to show that the

cause of action was one arising upon contract, judgment or decree. The court held:

"Jurisdiction cannot be acquired in such case, by amendment of the petition and affidavit, showing a cause of action arising upon contract, without the issuance of an attachment after the amendment." (Syl. 2.)

In *Endel vs. Leibrock*, 33 O. S. 254, the court held:

"A writ of attachment under the code, without the requisite affidavit, is void.

"The seizure of property of a non-resident debtor, upon whom service of summons can not be made on such void writ, does not give the court such jurisdiction over the defendant or his property as will authorize a service by publication, or a judgment in the action." (Syl. 1 and 2.)

As the question here involved is one of Ohio law, it seems unnecessary to discuss the decisions from other states. For the same reason, 28 U. S. C. A. Section 777, relied upon by counsel for petitioner (their brief pages 28, 40), has no application, for it specifically refers to "summons \* \* \* return process \* \* \* or other proceedings in civil causes in any court of the United States," whereas all of the proceedings we claim to be nonamendable were had in the Common Pleas Court of Lucas County, Ohio. Moreover, 28 U. S. C. A., Section 777, refers to defects "in form," whereas, under the decisions of the Supreme Court of Ohio, *supra*, a valid affidavit is a jurisdictional requisite to proceedings in attachment and garnishment, and, hence, a defect therein is a *jurisdictional* defect and not merely one of form. Cases such as those cited at page 40 of petitioner's brief which deal with actions in admiralty or which were orig-

inally commenced in the District Court of the United States, wherein *personal service* had been made upon the defendants, are not in point, as the jurisdiction of the court there is acquired as a result of personal service and the attachment is a mere incident to the action. In our case a valid attachment is the essential prerequisite upon which the jurisdiction of the court depends.

As stated by the Supreme Court in *Pennoyer vs. Neff*, 95 U. S. 714:

“ \* \* \* the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property.  
\* \* \* ” (P. 728.)

In other words, in an attachment under the state practice of Ohio, the first inquiry must be, have the requisite steps been taken to give the court jurisdiction over some property of the defendant? If not, there is nothing before the court on which it can exercise jurisdiction. *A nullity can not be amended.*

“ \* \* \* where the jurisdiction is dependent upon the order of attachment accompanying the summons, the attachment having failed, it follows that the jurisdiction upon the merits must also fail.

“6 Corpus Juris, 465, says:

“Where, however, a suit is commenced by attachment, and the attachment is essential to the jurisdiction of the court, the dissolution of the attachment will carry with it the main suit.”

*Adams vs. Lumber Company*, 117 O. S. 298, 303. (1927).

In *Bear vs. Old Tyme Distilleries, Inc.*, 6 O. O. 253, the plaintiff attempted to secure an attachment after a previous attachment had been discharged. The journal entry of the court states in part:

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"This court finds that said action was a proceeding *in rem* and that *the attachment of the property of the defendant therein was essential to the jurisdiction of the court and that therefore the dissolution of the attachment carried with it the dismissal of the main suit*, and that the order should have included the dismissal of said petition." (P. 253.) (Italics ours.)

In this case the jurisdiction of the court below on removal obviously could be no greater than the jurisdiction of the Court of Common Pleas would have been if the case had remained there. Had the case not been removed the attempted amendment would not have been effective to breathe life into the abortive attachment proceedings had some six years earlier. Having been removed the attempted amendment was no more effective than it would have been in the state court. It seems clear that a statute expressly attempting to make such an amendment effective would be invalid. But there is no such statute. On the contrary, as held by the courts below, in Federal courts an attachment is not permitted without personal service upon the defendant. The attempted amendment was, therefore, completely ineffectual under the state or the federal law. We, therefore, submit that the proceedings attempted in Federal Court, although planted there under the guise of amended and supplemental proceedings, must in law be regarded as an attempt to start a new and different action in the Federal Court, which was wholly ineffective in that court, and would have been wholly ineffective had the amended pleadings been filed prior to removal in the state court, to validate the abortive attachments and garnishments under the defective state court affidavits.



**(2) THE ATTEMPTED ATTACHMENT BY PROCESS OF THE FEDERAL COURT WAS WHOLLY INEFFECTIVE BECAUSE THE STATE STATUTES DO NOT PROVIDE FOR OR PERMIT AN ALIAS WRIT OF ATTACHMENT.**

The plaintiff's entire argument, that not permitting an attachment to be issued out of the federal court in this case makes the procedure in the federal court different from that in the state court, proceeds upon the erroneous hypothesis that the plaintiff could have issued a second order of attachment and a second notice to garnishees, had the case remained in the state court without starting his proceedings all over again.

In other words, the plaintiff erroneously contends that had the case remained in the state court, he could have amended his original attachment proceedings by having issued an alias order of attachment and notice to garnishees.

In addition to the other reasons pointed out in this brief why petitioner's claim is wrong, it is our contention that the statutes of Ohio do not authorize the issuance of a second or alias order of attachment and notice to garnishees to be issued to the sheriff of the *same* county who received the prior order of attachment and notice to garnishees.

The only references in the Ohio General Code to two or more orders of attachment are the following sections:

**Section 11,823:**

*"Orders of attachment may be issued to the sheriffs of different counties. Several of them at the option of the plaintiff, may be issued at the same time or in succession. But such only as have*

been executed shall be taxed in the costs, unless otherwise directed by the court. (R. S. §5525.)" (Italics ours.)

Section 11,825:

"When there are several orders of attachment against the same defendant, *they shall be executed in the order in which they were received by the sheriff.* (R. S. §5527.)" (Italics ours.)

Section 11,835:

"When the property is under attachment, attachments thereon under subsequent orders must be as follows:

"1. If it is real property, it shall be attached in the manner prescribed for executing attachment;

"2. If it is personal property, it shall be attached as in the hands of the officer, *and be subject to any previous attachment;*

"3. If a person be made a garnishee more than once with respect to the same indebtedness or liability, a copy of the order and notice shall be left with him in the manner prescribed for serving a garnishee. (R. S. §5536.)" (Italics ours.)

The latter two sections obviously refer to orders of attachment or notice to garnishees issued on behalf of *different* plaintiffs against property of the same defendant, for General Code Section 11,825 provides the priority which successive attachments shall have. The matter of priority as between different attachments would become important only where the attachments were made on behalf of different individuals. Hence that section clearly furnishes no basis for a claim that more than one attachment or garnishment against the same defendant on behalf of the same plaintiff is authorized by the Ohio statutes. Likewise, Section 11,835 furnishes no basis for

any such contention, because it relates principally to the procedure to be followed in successive attachments by different plaintiffs, and numbered paragraph 2 of that section clearly shows that the situation referred to is one in which different plaintiffs have secured successive attachments, for that paragraph, like Section 11,825, fixed the priorities of successive attachments which, as pointed out, would have no importance if the attachments were by the same plaintiff.

The only statute relating to more than one attachment *by the same plaintiff against the same defendant* is Section 11,823 providing that such orders may be issued "*to the sheriffs of different counties.*" Under the familiar maxim of statutory interpretation, Section 11,823 excludes the possibility of issuing several orders to the sheriff of the ~~same~~ county. That rule of interpretation is clearly stated in *Cincinnati vs. Roettinger*, 105 O. S. 145, where the court said at page 152:

"\* \* \* For the purpose of determining the legislative intent the maxim *expressio unius est exclusio alterius* has direct application. That maxim has peculiar application to any statute which in terms limits a thing to be done in a particular form, and in such case it necessarily implies that the thing shall not be done otherwise. That maxim finds its chief use as an aid in ascertaining the whole scope of a law. \* \* \*"

It should be further pointed out that all the other statutory provisions relating to orders of attachment and notice to garnishees simply refer to a *single order or notice*. Thus, Ohio General Code, Section 11,819, provides that under certain conditions

"\* \* \* the plaintiff may have an attachment. \* \* \*"

Ohio General Code, Section 11,820, provides:

"An order of attachment shall be made . . . when there is filed . . . an affidavit of the plaintiff. . . ." (Italics ours.)

Ohio General Code, Section 11,821, refers twice to "the attachment" and twice to "*the order*."

Ohio General Code, Section 11,822, refers to "*the order*," which shall set forth the amount of the plaintiff's claim "to be stated in the order as in the affidavit."

Ohio General Code, Section 11,824, refers to "*the order*" and sets the return day depending upon when "it" has issued.

Ohio General Code, Section 11,828, provides that "*when the plaintiff*" makes a proper affidavit, the sheriff must serve garnishees with a written notice and a copy of *the order of attachment*.

One of the leading cases holding that a second order of attachment, under statutes similar to those in force in Ohio, is unauthorized is *Crary vs. Dye*, 208 U. S. 515, where, in affirming the Supreme Court of the Territory of New Mexico, it was said:

"1. The statutes of the territory distinguish between original and ancillary attachments. Sections 2686 and 2721 of the Compiled Laws of New Mexico. There is no provision for an alias attachment, and it was hence concluded by the Supreme Court of the territory that an alias attachment was not authorized, and that a judgment dependent thereon was void and could be attacked collaterally. The procedure in attachment is provided for in Chapter II of the Compiled Laws of New Mexico, §§2686 to 2737, both inclusive. A summary of the applicable sections is inserted in the margin.

"There is no provision for an alias attachment,

and we think the implication of the statute is against it, certainly against it except upon filing a new affidavit and bond and a new publication of notice \* \* \*." (Pp. 516, 517).

The opinion in the same case of the Supreme Court of the Territory of New Mexico is reported as *Dye vs. Cray*. (New Mex., 1904) 78 Pac. 533. That court said:

"\* \* \* The legislature has undertaken to give us an attachment procedure. Comp. Laws 1897, §§2686 to 2736, inclusive. *If alias writs of attachment are not authorized* by our statutes, then they cannot issue. \* \* \* The ground for the attachment might exist when the bond was given and the original writ issued, but might not exist at the time of the issuance of an alias writ. For instance, the first ground of attachment provided for in the statute—non-residence—existing at the time of the issuance of the original writ might not exist at the time of the issuance of the alias writ, for the defendant, long before the issuance of the alias writ, might have become a resident of the territory, and, *if an alias writ of attachment can be issued at all, it can as well be issued one year after the issuing of the original writ as one day or one month thereafter.* \* \* \* Attachment being in derogation of the common law, we must look to our statutes. If our statutes do not authorize the issuance of an alias writ of attachment, then one cannot be issued. Certainly, our statutes do not provide for an alias writ of attachment in express terms; nor, do we think, by implication." (Pp. 533, 534.) (Italics ours.)

As shown in the foregoing opinion and as set forth in the footnotes in the case in the Supreme Court of the United States, the statutes of New Mexico provide for "original writs of attachment," i. e., cases begun by attachment, and for "ancillary writs of attachment," i. e.,

cases begun by service of summons upon the defendant. In Ohio both types of attachments are provided for in the same statutes by providing that an attachment may issue at or after the commencement of the action. Ohio General Code, Section 11,819.

It should be pointed out that the Compiled Laws of New Mexico, Sections 2696, 2697 and 2722, refer to writs of attachment in the plural. Notwithstanding this fact, the court held that an alias attachment could not issue. The Ohio statutes present an even stronger case for such a holding as they do not make any reference to more than a single writ in the same suit excepting in issuing writs to different counties.

The conclusion of the court in the *Dye* case, *supra*, that the requisite bond given for the issuance of an order of attachment would not cover damages caused by the issuance of an alias order is in point under Ohio General Code, Section 11,821, which, after providing that an attachment may issue without bond when the defendant is a foreign corporation and not a resident of the state, further provides:

“ \* \* \* In all other cases *the order* shall not be issued by the clerk until a bond is executed in his office by sufficient surety of the plaintiff, to be approved by the clerk, in a sum equal to double the amount of the plaintiff's claim, to the effect that he will pay the defendant all damages which he may sustain by reason of *the attachment* if *the order* proves to have been wrongfully obtained.”  
(Italics ours.)

The court said in the *Dye* case, *supra*:

“ \* \* \* Could it be said that the bondsmen would be holden for damages for the wrongful suing out of the alias writ of attachment \* \* \* ”



We think not. \* \* \* The conditions of the parties might change very materially, and the bondsmen might not be willing under such changed conditions to stand sponsor for the damage that might result from the issuance of an alias or any other writ of attachment under the then existing circumstances. Yet, if an alias writ may issue, it must carry with it the obligations of the bondsmen; otherwise you have a writ of attachment without bond, which certainly cannot be contended. \* \* \* (P. 534.)

It follows that if an alias order of attachment cannot issue in cases where the original order of attachment required a bond, an alias order cannot issue in cases where no bond was required with the original order of attachment, as no distinction is made anywhere in the statutes.

Furthermore, the defendant may have his property released from attachment by giving bond *in double the amount of plaintiff's claim* (Sec. 11848). It seems clear that the statutes do not contemplate an alias attachment, as by this simple means the plaintiff could nullify the effect of such a bond and harass the defendant by repeated attachments.

The attachment laws of Illinois contain a provision similar to the Ohio statutes in regard to issuing orders of attachment to the sheriffs of different counties.

*Starr & Curtis's Annotated Illinois Statutes*, Second Edition, Vol. 1, Chapter 11, Sec. 13:

"The creditor may, at the same time, or at any time before judgment, cause an attachment writ to be issued *to any other county* in the state where the debtor may have property liable to be attached, which shall be levied as other attachment writs: \* \* \* (Italics ours.)

The leading case in Illinois is *American Trust & Savings Bank vs. Pack, Woods & Co.*, 70 Ill. App. 177, affirmed in *Pack, Woods & Co. vs. American Trust & Savings Bank*, (Illinois, 1898) 50 N. E. 326. In the opinion the Court of Appeals said:

"This court has held in *Dennison vs. Blumenthal*, 37 Ill. App. 385 (affirmed by the Supreme Court under the title of *Dennison vs. Taylor*, 142 Ill. 45, upon another point, and without alluding to the point in question), that proceedings by attachment are in derogation of the common law, and can only exist and be carried on by virtue of some statutory provision, and that the statutes of this state make no provision for an alias writ in case of an original attachment; and such decision applies as well in the case of an attachment in aid, as in the case of an original attachment.

"Secs. 31 and 33 of the attachment act require that proceedings in the cases of attachments in aid shall, as near as may be, conform to proceedings in cases of original attachments, and it follows that if no *alias* writ may issue in cases of original attachments, none may in cases of attachments in aid. *Crandall vs. Birge*, 61 Ill. App. 234.

"But appellee contends that because nothing was done under the first writ except to return it unexecuted by order of plaintiff's attorney, it was a nullity, the same as if no writ had ever issued, and therefore the plaintiff had in reality but one writ of attachment in aid of his suit, viz.: the second writ, which therefore was not in any proper sense an *alias* writ. We can not assent to the correctness of such contention.

. . . . .

"An *alias* writ is a writ issued where one of the same kind has been issued before in the same cause.

. . . . .

"Nor could the fact that in the second writ there

was named a different garnishee from that named in the first writ, make the second writ an original writ." (Pp. 178, 179.)

In the opinion of the Supreme Court of Illinois the court said:

"The chief question presented by this record is, can a second attachment in aid be issued in the same suit after a return of the first writ unexecuted? \* \* \* In the case at bar the suit was begun by the issuing of a summons. Then a writ of attachment in aid was regularly sued out and returned unexecuted, as was also the summons. There was nothing more done until two months later, when a new affidavit and bond were filed, and a new writ of attachment issued and served on defendant in error. Was this an alias writ? Plaintiff in error contends that it was not, as it was not issued on the first affidavit and bond, but on a new affidavit and bond. An alias writ is a second writ issued where one of the same kind has been issued before in the same cause, when the former writ has not produced its effect. Counsel for plaintiff in error probably filed the second affidavit and bond in view of the language used in the *Dennison* case, that the original bond does not cover damages caused by the wrongful issue of an alias writ. The second writ here in controversy does not contain the words, 'as we have formerly commanded you' ('*sicut alias praecepimus*'), from which the alias writ derives its name; but because of such omission was it any the less an alias writ? It was a second writ issued in the same cause, the first writ having failed to produce its effect; and the additional affidavit and bond, in the absence of statutory authority for a second attachment in aid, can no more be held to change it from an alias writ to an original writ than a praecipe for a second summons in the same cause can be held to call for an original summons, and not for an alias sum-

mons. This was a suit against Pack, Woods & Co., and no jurisdiction could be obtained over the corporation or its property unless by personal service, or by attachment or garnishment of some of its property. No jurisdiction was obtained by the first writ, and the second was an alias writ for the purpose of securing what the first writ had failed to accomplish. We find nothing in the statute authorizing the issuing of an alias writ of attachment. \* \* \* No provision is made anywhere for more than one writ, except in Section 13, which provides that 'an attachment writ' may be issued to any other county in the state where the debtor may have property liable to be attached. It is contended, because Section 33 provides that 'upon the return of attachments issued in aid of actions pending,' etc., it is thereby implied, by the use of the word 'attachments,' that more than one writ of attachment may be issued; but the plural, 'attachments,' was evidently used to correspond with the plural, 'actions pending,' immediately following, and the whole section gives no countenance to the position contended for. *As the statute nowhere provides for more than one writ of attachment to the same county in the same suit,* we think the issuing of the alias writ was unauthorized, and no jurisdiction was obtained by the court by the service of the same on the garnishee. The motions to quash the writ should have been sustained. It was error to overrule them, and the Appellate Court decided correctly in so holding. \* \* \* (Pp. 327, 328) (Italics ours.)

An Ohio case which directly passes upon the impropriety of issuing a second order of attachment is *Bear vs. Old Tyme Distilleries, Inc.*, (August 17, 1936) 6 Ohio Opinions 253. After the first attempted order of attachment proved invalid because (as here) prematurely issued, the plaintiff filed an affidavit for service

by publication, had the notice published, and then issued another attachment. This second attachment was attacked by motion, defendant contending that the dismissal of the first attachment in effect disposed of the entire case since there was no authority for a second attachment under the Ohio statutes. The journal entry of the court was in part as follows:

"This day this cause came on to be heard upon the motion of the defendant, Old Tyme Distilleries, Inc., filed February 7, 1936, to dismiss, quash and discharge the attachment heretofore issued herein and predicated upon an affidavit and attachment filed herein on the 10th day of January, 1936, and it appearing to the court that heretofore, to-wit, on February 21, 1935, a petition, affidavit for constructive service, affidavit for attachment and garnishment were filed, and an order of garnishment issued thereon, and that upon motion of defendant to quash said order of garnishment and attachment and upon hearing thereof, this court found that said order of attachment was invalid and sustained the motion of the defendant to quash and discharged said attachment.

*"This court finds that said action was a proceeding in rem and that the attachment of the property of the defendant therein was essential to the jurisdiction of the court and that therefore the dissolution of the attachment carried with it the dismissal of the main suit, and that the order should have included the dismissal of said petition."* (P. 253.) (Italics ours.)

From the foregoing cases and authorities we respectfully submit that there is no provision in the statutes of Ohio authorizing the issuance of a second or alias writ of attachment or notice to garnishee to the sheriff of the same county, and that the plaintiff in our case could not

have issued orders and notices similar to those attempted to be issued by the federal court had this case remained in the Court of Common Pleas of Lucas County, Ohio. For this additional reason the decree of the lower court is correct and should be affirmed.

**(3) THE ATTEMPTED ATTACHMENT BY PROCESS OF THE FEDERAL COURT WAS WHOLLY INEFFECTIVE BECAUSE OF FATAL DEFECTS IN THE NEW PROCEEDINGS, INCLUDING ISSUANCE OF THE ORDER OF ATTACHMENT PRIOR TO COMMENCEMENT OF THE ACTION.**

We have hereinbefore shown that under the statutes of Ohio an attachment may issue only "at or after" the commencement of an action. See pages 18 to 32 hereof. In the state court proceedings petitioner *caused a summons to issue prior to the issuance of the order of attachment*, and contends under Section 11279, O. G. C., that this constituted the commencement of the action although the summons was not served. We believe we have shown that this is not correct, and that where the summons is not served, the action has not been commenced so as to permit the issuance of a valid order of attachment *until the first publication of notice has been made to the defendant*, as prescribed by Section 11230, O. G. C.

*In the case of the proceedings in the District Court, however, whichever rule be applied, the record affirmatively shows that the order of attachment was prematurely issued.*

*The order of attachment was issued by the federal court on February 17, 1936. The summons was not issued by the federal court until April 4, 1936 (R. 86). The rec-*



ord either shows no publication of notice to the defendant in the federal court, or if the record be supplemented by the stipulation we have offered to petitioner, then it shows that the first publication of notice to the defendant of the proceedings in the District Court was *February 19, 1936*.

Even if it be assumed, therefore (contrary to the law of Ohio), that if the proceedings had remained in the state court, further proceedings could have been had in the same action in that court, and even if it be assumed (contrary to the federal law as hereinafter shown) that the District Court had the same power to issue an order of attachment without personal service of summons that the state court had, nevertheless, it affirmatively appears that the petitioner did not obtain a valid attachment in the federal court, for the reason that *he caused it to be issued prior to instead of at or after the commencement of the action, even using petitioner's own definition as to what constitutes the commencement of an action.*

It is of interest in connection with the attempted attachment in the federal court to note the tacit admission by petitioner of the fatal errors and defects hereinbefore mentioned in the state court proceedings, which admission arises by the differences in the two proceedings, as well as by the fact that petitioner thought it necessary to file the second set of pleadings.

For example, the state court affidavit for attachment does not contain the statement that affiant "does believe" and contains no description of the property to be attached. The supplemental affidavit (R. 33) in attachment, filed in the federal court, states that affiant "does believe" and contains a description of the prop-

erty. The state court affidavit was verified before a notary not qualified. The supplemental affidavit in the District Court was notarized by a qualified notary. The sheriff's return in the state court did not state the names of the garnishee(s) or the time each was served, whereas the return of the marshal (R. 36) contains this information. The sheriff's return (R. 9) does not show service of the order of attachment on the garnishees but the marshal's return (R. 36) shows such service. The sheriff's return stated that he had found no property of the defendant. The marshal's return makes no such statement. The affidavit for attachment in the state court (R. 6) described the property to be attached as that of Devon Syndicate, Ltd., and Paris E. Singer, whereas the supplemental affidavit in the District Court (R. 33) seeks attachment of the property of Devon Syndicate, Limited, and/or Paris E. Singer.

Petitioner, however, did not have a correct order of attachment issued out of the District Court, as the property which the marshal was commanded to attach (R. 37) was that of "Devon Syndicate, Ltd., and Paris E. Singer in your district," and it nowhere appears in its record that any jointly owned property was reached by the new attachment.

It seems quite clear that by making the above mentioned changes in the attempted proceedings in the District Court petitioner was admitting and seeking to eliminate the defects which defendant had pointed out to him in the state court proceedings, and was again attempting to commence the action but *again failed to do so at or before the issuance of the order of attachment.*

- (4) **THE ATTEMPTED ATTACHMENT BY PROCESS OF THE FEDERAL COURT WAS WHOLLY INEFFECTIVE BECAUSE THERE HAD BEEN NO PERSONAL SERVICE OF PROCESS UPON THE DEFENDANT IN THAT COURT OR IN THE STATE COURT, AS IS REQUIRED TO SUSTAIN A WRIT OF ATTACHMENT ISSUED BY A FEDERAL COURT.**

We believe what has been said in the next preceding section hereof demonstrates that the filing of the amended and supplemental petition and amended and supplemental affidavit for attachment in the District Court can not be considered as an amendment of the void proceedings which had been removed from the state court, but was the equivalent of an attempt to commence a new action in the District Court. If so regarded it falls squarely within the decision by this court in *Big Vein Coal Company of West Virginia vs. Read*, 229 U. S. 31, to the effect that a valid order of attachment can not be issued by a federal court in the absence of personal service upon or voluntary appearance of the defendant in the action.

Petitioner does not contest the correctness of the decision of this court in *Big Vein Coal Company of West Virginia vs. Read*, but contends that a different rule should apply in a case removed to the federal court than the rule applicable in the case of an action commenced in the federal court. Petitioner claims that because Section 28, U. S. C. A. 79 (Section 36, Judicial Code) (Appendix page 91), preserves in removed cases all *valid* attachments actually made before removal, and 28 U.

S. C. A. 81 (Section 38, Judicial Code) (Appendix page 91), provides that the District Court shall proceed as if the suit had been commenced in the District Court, and, thus, under 28 U. S. C. A., Sections 724 to 726 (Appendix page 93), an action commenced in the federal court would follow state practice to the extent provided by those sections, that upon removal of a cause to the federal court that court may issue a valid attachment without personal service of process *even though the state court proceedings are void and vested no jurisdiction of any property in either the state or the federal courts.*

We have hereinbefore shown, pages 54 to 58, that there can not be an amendment in the state courts of Ohio of *void* attachment proceedings. From this it necessarily follows, even under petitioner's argument, that the federal court following the state court practice can not authorize an amendment of a void attachment.

Petitioner's brief makes it entirely clear that what petitioner is seeking to do is to relate his attempted attachment in federal court back to the date of the filing of the petition in the state court about six years earlier, and to have it held that a lien arose by virtue of the federal court attachment, not as of the date it was issued or served, but as of the date some six years earlier of the issuance and service of the *void* state court attachment.

No one contends that petitioner could not have started new proceedings in attachment in the state court, which, if properly commenced and carried forward, would have resulted in a valid attachment lien upon such property of the defendants as might have been reached by such new proceedings. Such new proceedings could be,

by the filing of a new petition under a new docket number, and the filing of a proper affidavit for attachment and proper publication of notice and issuance, service and return of order of attachment, or they might possibly have gone forward in the state court (on the theory *disapproved* in *American Trust and Savings Bank vs. Pack, Woods & Company, supra*, pages 66 to 68, that everything which had been done therein was a nullity except the filing of the petition); by filing a new and proper affidavit for attachment under the old docket number without filing any new petition, and by having proper publication of notice and issuance, service and return of a new order of attachment therein. This might be regarded as the equivalent of the commencement of a new action under which plaintiff's rights would arise, not as of the date of the filing of the petition, but as of the time he completed doing the things necessary to the commencement of an action and the issuance and service of a valid order of attachment. This is the procedure which seems to be suggested by the Supreme Court in the cases of *Leavitt vs. Rosenberg*, 83 O. S. 230, and *Pope vs. Hibernia Ins. Co.*, 24 O. S. 481, which are relied upon by petitioner. In the *Hillman* case Judge Westenhaver said (P. 203):

“\* \* \* He would have, it is true, a petition lodged in the clerk's office, with a number on the appearance docket of the court; *but each act and step required by law to begin an action would have to be commenced over again.*” (Italics ours.)

But as above pointed out, this is not the position contended for by the petitioner here. He is contending here that what he did in the District Court was not

equivalent to the commencement of a new action but was a mere amendment of the state court proceedings and *should be treated as though the things which he did in the federal court in 1936 had been done by him in the state court in 1930*; and this although his 1936 affidavit referred to facts claimed to be existing in 1936 and made *no reference to any state of facts existing in June, 1930*. Thus the right of any intervening transferees, execution creditors and holders of other liens arising during the six-year period are to be destroyed and the proceedings in federal court are to be given a *nunc pro tunc* effect in favor of plaintiff and against defendant. In order to reach this result, petitioner asks this court to hold that proceedings in the state court, which were void and gave that court no jurisdiction of any property, should be treated as having *some* vitality and as having created *some* jurisdiction over *something* so that the federal court may not be bound by the rule of the *Big Vein Coal Company* case and may issue an attachment without service of process and by engrafting it upon the void state court proceedings, give life to both.

We submit that merely to state this proposition is to demonstrate that it is untenable.

The principal argument advanced in support of this claim of the petitioner is that by repeated removal proceedings defendant "could prevent a plaintiff from ever securing an attachment in any action." This claim is a manifest absurdity. If a plaintiff follows the state court practice and actually gets his action commenced by the beginning of publication and has his attachment validly levied, it is expressly provided by 28 U. S. C. A., Section 79, that after removal proceedings



“\* \* \* any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. \* \* \*”

There is no way by which a defendant even if he knew in advance that he was going to be sued and had his removal papers all ready, could remove in time to prevent commencement of the action in state court, if the plaintiff proceeds according to law.

It is true that if *the petitioner has failed to commence his state court proceedings in accordance with the state law* and the case is one in which personal service can not be obtained, he can not rely upon such void state court proceedings as the basis for amendment in federal court, but must start new proceedings in the state court. The only difference, if any, between his position where such a void proceeding has been removed and his position where it has not been removed is that in the former case he would certainly have to file a new petition in the state court, whereas in the latter case it may be that he could rely upon his old petition, providing he took all other steps anew. In either event, his rights would be the same, his lien would attach in the new proceedings at the same time, and in neither case would such lien relate back to the void original attachment. It thus will be seen that petitioner's whole argument based on the supposed *practical necessity* of a ruling in favor of his contentions, is without foundation and that no reason exists for applying any different rule permitting amend-

ment of an attachment, *which is the basis of jurisdiction*, in federal court in a removal case, than in a case originally filed in the federal court.

As we understand them, the rationale of such cases as *Big Vein Coal Company of West Virginia vs. Read*, 229 U. S. 31, and *Ubarri vs. Laborde*, 214 U. S. 168, and like decisions, which hold that an attachment may not issue out of a federal court unless personal service has been had upon the defendant, is that attachment is an auxiliary remedy which is "but an incident to the suit, and unless the suit can be maintained through jurisdiction properly obtained, the attachment must fail." A removed attachment suit in which there has been no personal service of summons is manifestly one in which there is no jurisdiction unless the attachment in the state court is *valid*. When, as here, it is *invalid*, it follows that as the suit can *not* "be maintained through jurisdiction properly obtained the 'federal' attachment must fail."

In view of the complaint by petitioner that the removal proceeding results in his being deprived of a procedural right which he would have if the case were not removed (namely, the right to have a new attachment issue upon taking the steps prescribed by law for an original attachment in state court), it is, we believe, pertinent to point out that the statutory right of removal is not conditioned upon the preservation to the plaintiff of the exact procedural rights appertaining to the state court from which removal is had. Federal power over procedure is undoubted.

*Wayman vs. Southard*, 10 Wheaton 1;  
*Erie Railroad Co. vs. Tompkins*, 304 U. S.  
 64, 92.

Numerous examples may be found in the reported cases of differences in a removal cause between the procedural rights of the parties before and after removal. Among them are the following:

*Ex Parte Fisk*, 113 U. S. 713; (Examination of party in advance of trial permitted in state court denied after removal.)

*Potter vs. National Bank*, 102 U. S. 163;

(Witness and testimony incompetent under state law. Competent and admissible after removal.) and

*King vs. Worthington*, 104 U. S. 44;

*Employers Corp. vs. Bryant*, 299 U. S. 374;

(Cause remanded because personal service could not be obtained upon defendant within district, although defendant could have been reached by process of state court in the absence of removal.)

Petitioner argues that Congress has, by Sections 724 and 726 of 28 U. S. C. A., preserved upon removal the same initial procedural rights by way of attachment that plaintiff had in the state court, but petitioner concedes that these sections of the statutes do not give a plaintiff who starts his action in the federal court the same initial procedural rights which he would have in the state court. Petitioner must make this last concession in view of *Big Vein Coal Company* case and like cases. Petitioner thus says that these sections of the statute should be read as though they differentiated between removed causes and causes initially begun in the federal court, but none of

*these sections makes any such distinction.* Whatever Sections 724 and 726 provide for, they provide for equally, whether the cause be begun in or removed to the federal court. In the *Big Vein Coal Company* case the court specifically rejected the argument that by reason of Section 726 an attachment might issue out of the federal court without the necessity of personal service being had. Section 79 merely preserves after removal whatever rights may have been obtained by valid attachment in a state court.

Sections 81 and 83 of 28 U. S. C. A. (Judicial Code §§38, 39) are, we submit, decisive of the present question. Section 81 provides that after removal, suits shall proceed as if they

“\* \* \* had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said state court prior to its removal,”

and that the District Court shall

“\* \* \* proceed therein as if the suit had been originally commenced in said district court, \* \* \*”

Obviously this means the District Court in this case was bound by the rule of the *Big Vein Coal Company* case, *supra*, and had no power to issue an attachment in the absence of personal service on the defendant. Furthermore, the state court process being defective, the only authority the District Court had to complete such process was under Section 83:

“\* \* \* in the same manner as in cases which are originally filed in such United States court. \* \* \*”

This again brings us back to the rule established by the *Big Vein Coal Company* case and similar cases. The clear and precise provisions of Sections 81 and 83 are no doubt the reason for the paucity of judicial authority to the contrary of petitioner's claims herein.

It is clear under the statutes and decisions, that the true rule as to the power of the Federal Court to proceed, by amendment if necessary, in removed attachment proceedings, in the absence of personal service is as follows:

If the action in the state court has been properly commenced and steps to attach property have been begun in such a way that if carried to completion, in the state court before removal, jurisdiction of property would have been obtained by the state court, the attachment proceedings may be completed in the Federal Court after removal, and amendment of non-jurisdictional defects may be made. But if the action has not been properly commenced in the state court, or the proceedings for attachment begun therein are defective so that if carried to completion in the state court prior to removal, no jurisdiction of property would have been obtained, or if there are jurisdictional defects in the proceedings, in any of these events the Federal Court (personal service still not having been obtained) has no power to do anything other than to dismiss the entire proceedings.

We therefore respectfully submit that the courts below were right in their decision on this question for the reasons stated in their opinions (R. 49, 50, 96 to 98).

- (5) PETITIONER ABANDONED THE PROCEEDINGS IN THE STATE COURT BY FILING THE NEW PETITION AND NEW AFFIDAVIT FOR ATTACHMENT, HAVING A NEW SUMMONS AND NEW ORDER OF ATTACHMENT ISSUE, AND MAKING A SECOND PUBLICATION OF NOTICE IN THE UNITED STATES DISTRICT COURT NEARLY SIX YEARS AFTER THE PETITION WAS ORIGINALLY FILED IN THE STATE COURT, AND THEN WHOLLY ABANDONED ALL PROCEEDINGS HEREIN IN BOTH FEDERAL AND STATE COURTS BY FILING AN ENTIRELY NEW PETITION AND ATTEMPTING TO SUE OUT AN ENTIRELY NEW ATTACHMENT IN THE STATE COURT ON JULY 13, 1936.

The general rule is that a repetition, such as occurred in this case, of some act or proceeding attempted to have been taken at a prior state of the proceeding is an election to abandon the former and to rely on the latter.

*Ungerleider vs. Ewers, Recr. of Levering Bros.*, 20 O. A. 79-87;

*Raymond vs. The T., St. L. & K. C. R. R. Company et al.*, 57 O. S. 271.

This rule was applied to a second writ of attachment by the Supreme Court of Louisiana in *Smith vs. Wilson*, 128 So. 682 (1930). In that case the sheriff, after serving the first writ, lost it, and made no return, and a second writ was issued without any amendment of the other proceedings and the property was again seized under the second writ. Subsequent proceedings were based on the second writ. The court said:



"\* \* \* while it must be conceded that the loss of the originals of such instruments did not require that plaintiff should begin the proceedings anew and have the property again seized and process served, *the record shows that plaintiff elected to take such course rather than to have duplicates of the instruments issued, and plaintiff must be held to have abandoned the original attachment and proceedings thereunder*; \* \* \* *Erwin vs. Bank*, 3 La. Ann. 186, 48 Am. Dec. 447; *Pugh vs. Flannery, supra*." (P. 683.) (Italics ours.)

The complete repetition in the District Court of all of the prior proceedings was, we respectfully submit, an abandonment of such prior proceedings. The fact that the repetition was unavailing does not change its effect as an abandonment of the earlier proceedings. See *Smith vs. Wilson, supra*, in which the second attachment as well as the first was held void.

In addition to abandoning the state court proceedings in the manner just stated, however, the petitioner further abandoned the entire proceedings in both the state and federal court in this case by filing a new petition asserting the same claims and seeking to attach the same property in the Court of Common Pleas. The petition in this new action was filed in that court on July 13, 1936, two days after the entry of the judgment of dismissal in the present case by the District Court on July 11, 1936.

Respondent filed in the Circuit Court of Appeals a motion to dismiss the appeal on the ground that it had been abandoned and had become moot by the filing of this new suit and supported the motion by certified copies of the record of the state court in the new suit. The petitioner, in making up the record for this court, failed

to include therein, "Respondent's motion to dismiss appeal, notice thereof and certified copies in support thereof" so filed in and submitted to the Circuit Court of Appeals. Petitioner has declined to stipulate that the motion to dismiss and supporting papers may be deemed to be part of the record before this court. We have, therefore, printed them in a separate volume as Appendix C to this brief, and respectfully request that they be considered by this court and, if necessary, that this brief be treated as a motion suggesting a diminution of the record and that an order may be entered making the motion and supporting papers a part of the record.

There are numerous cases supporting our contention that the filing of a second suit upon the same cause of action is an abandonment of the appeal and an acquiescence in the decision of the lower court in the first case, particularly where, as in this case, the position taken by the plaintiff in the second case is inconsistent with the position sought to be maintained by him in the first case.

In *Morrison et al. vs. Bernot*, 108 Pac. 772 (Wash., 1910), the Supreme Court of Washington said:

"\* \* \* the appellant was at liberty to prosecute an appeal from the judgment of dismissal, or to prosecute a new action for the same cause, but manifestly he could not do both, for the rule is well established that, if a party after judgment against him, prosecutes another action based upon the same cause, he thereby estops himself to appeal from the first judgment or bring error to review it. *Carr vs. Casey*, 20 Ill. 637; *Gordon vs. Ellison*, 9 Iowa 317, 74 Am. Dec. 353; *Liebuck vs. Stahle*, 66 Iowa 749, 24 N. W. 562; *Ehrman vs. Astoria R. Co.*, 26 Or. 377, 38 Pac. 306. Inasmuch

as the appellant has waived his right of appeal from the first judgment, or is estopped to further prosecute it, such appeal must be dismissed." (P. 773, 774.)

In *Ault vs. Gill*, 14 Ky. L. R. 525 (1893), the abstract opinion by the court is as follows:

"\* \* \* A landlord, by instituting an action to recover rent, abandoned his right to prosecute an appeal which had been granted him from an order discharging an attachment for the same rent, and, therefore, the court properly refused to permit the papers in the attachment proceedings to be read to the jury in support of the defendant's plea that another suit for the same cause of action was pending on appeal." (P. 525.)

In *Carr, Administrator, vs. Casey*, 20 Ill. 637 (1858), the court said:

"\* \* \* By filing another bill for the same cause of complaint, the complainant acquiesced in and approved of the decree abating the former suit: While that suit is pending in the Circuit Court, and he is there calling upon the defendant to answer the matters complained of, he shall not be at liberty also to bring him into this court to defend the decree by which alone the complainant was placed in a position authorizing him to file the bill now pending: The demurrer must be overruled and the writ of error abated." (P. 638.)

In *Petersen vs. Strawn*, 192 N. W. 250 (Iowa, 1923), the court said:

"\* \* \* It is quite clear that appellant has no right to further prosecute the appeal. He may not have two suits pending in the courts for the same thing at the same time. The proceedings taken by him after the first trial, and from which this appeal

is taken, is in the nature of an abatement, or an abandonment of his right to appeal. \* \* \* (P. 251.)

In *Buckley, et al., vs. Kelly, et al.*, 257 Pac. 1107 (Okla., 1927), the syllabus by the court is as follows:

"Where a party after his appeal to this court causes an action to be instituted in the United States District Court, involving the same parties and the identical subject matter, the filing of such action in the latter court will be deemed to be an abandonment of the appeal in this court, and on proper motion the appeal will be dismissed."

See also to the same effect:

*Holland vs. Commercial Bank et al.*, 36 N. W. 112 (Neb., 1888);

*Wright, Barrett & Stilwell Co. vs. Robinson*, 82 N. W. 632 (Minn., 1900);

*Ehrman vs. Astoria & P. Ry. Co. et al.*, 38 Pac. 306 (Ore., 1894).

Under the law of Ohio a valid garnishment amounts to an assignment to the attaching creditor of the indebtedness garnisheed in so far as is necessary to satisfy his claim, which assignment is effective as of the date the attachment and garnishment were made.

*Alsdorf vs. Reed*, 45 O. S. 653;

*Secor vs. Witter*, 39 O. S. 218.

In the case at bar petitioner is contending that he obtained an attachment and garnishment of certain property of the defendants in June of 1930, and, hence, that under the Ohio decisions, just cited, he had, in law, an

assignment of that property to him effective from and after June, 1930. In the second suit filed by petitioner in the Court of Common Pleas on July 12, 1936, and the accompanying proceedings for attachment, he asserted that the garnishees held, as property of Devon Syndicate, Limited, the identical property which, in this case, he is contending had passed to him in June of 1930 by legal assignment resulting from the first garnishment proceedings. By making the assertion in the second case that the property in question is the property of the defendant, Devon Syndicate, Limited, he necessarily abandoned his claim that title had in law passed to him some six years earlier, as a result of the first attachment proceedings.

It thus appears that without waiting for action of the reviewing courts in the case at bar the petitioner has taken steps to protect his claims by a new action based on the theory that he acquired no right in and to the property here involved by his first proceedings. In short, as a basis of his new action he necessarily accepted the proposition that the judgment of the District Court discharging his attachments and dismissing his petition in this case is *not* erroneous. He, therefore, can not now be heard to contend in this court that that judgment is erroneous.

Under the rules of law enforced by the courts in the decisions hereinbefore cited, we submit it is clear that petitioner's appeal to the Circuit Court of Appeals had become moot and that the motion to dismiss it should have been sustained. That court took no action, either way, with respect to the motion to dismiss, as it disposed of the case, as shown by its opinion, on other grounds.

**CONCLUSION**

For the reasons hereinbefore set forth we respectfully submit that the judgments of the courts below were right and should be affirmed.

Respectfully submitted,

GEORGE D. WELLES,

*Counsel for Respondent.*

MILLER, OWEN, OTIS & BAILLY,

WELLES, KELSEY, COBOURN & HARRINGTON,

HENRY J. O'NEILL,

FRED E. FULLER,

FRED A. SMITH,

*Of Counsel.*



**APPENDIX A****NOTICE IN THE TOLEDO LEGAL NEWS,  
WEDNESDAY, FEBRUARY 19, 1936**

**"In the District Court of the United States for the  
Northern District of Ohio, Western Division**

**No. 3711 at Law**

**"Horton C. Rorick, Plaintiff,**

**vs.**

**Devon Syndicate, Limited, and Paris**

**E. Singer, Defendants.**

— "Devon Syndicate, Limited, also sometimes known as Devon Syndicate, Ltd., a foreign corporation, organized and existing under the laws of the Dominion of Canada, the last known address of its principal office and place of business being the Transportation Building, in the City of Montreal, Province of Quebec, Dominion of Canada, will take notice that on the 17th day of February, 1936, the plaintiff, Horton C. Rorick, filed his amended and supplemental petition against it in the District Court of the United States, for the Northern District of Ohio, Western Division, the same being Cause No. 3711 at Law, for the procurement by plaintiff against said defendant of a judgment for services rendered, based upon contract, all of which is more fully set forth in plaintiff's petition, together with his supplementary affidavit in garnishment on which said affidavit, orders of attachment and notices to garnishees have been issued by the clerk of said court and served on The Spitzer-

Rorick Trust & Savings Bank, Toledo, Ohio; The Spitzer-Rorick Trust & Savings Bank and Horton C. Rorick, Trustees, Toledo, Ohio; Horton C. Rorick, Toledo, Ohio; Everglades Club Company, Toledo, Ohio; and Blue Heron Land Company, Toledo, Ohio; attaching such moneys, property and assets of defendant, Devon Syndicate, Limited, and/or defendant, Paris E. Singer, in their possession and control, due and payable, or to become due and payable, to either one or both of said defendants, said moneys, property and assets being more particularly described in said supplemental affidavit in garnishment. Said garnishees are required to file their answers herein on or before the 11th day of April, 1936.

The prayer of said petition is for a decree sustaining said order of attachment and garnishment, and for judgment in favor of plaintiff and against said defendants, Devon Syndicate, Limited, and Paris E. Singer, and each of them, in the sum of Four Hundred Thousand Dollars (\$400,000) with interest thereon at the rate of six per cent (6%) per annum from the 12th day of June, 1930, and for costs of suit.

Said defendant is required to answer said petition on or before the 11th day of April, 1936, or judgment and decree will be taken against it.

Horton C. Rorick, Plaintiff,

By Fraser, Effler, Shumaker & Winn,

His Attorneys.

Toledo, Ohio, February 18, 1936.

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## APPENDIX B

## UNITED STATES STATUTES

28 U. S. C. A., Section 79, (Judicial Code, Section 36):

"When an suit shall be removed from a state court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed. (R. S. §646; Mar. 3, 1875, c. 137, §4, 18 Stat. 471; Mar. 3, 1911, c. 231, § 36, 36 Stat. 1098.)"

28 U. S. C. A., Section 81, (Judicial Code, Section 38):

"The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal. (Mar. 3, 1875, c. 137, §6, 18 Stat. 472; Mar. 3, 1911, c. 231, §38, 36 Stat. 1098.)"

28 U. S. C. A., Section 82 (Judicial Code, Section 39):

"In all causes removable under this chapter, if the clerk of the State court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall, on conviction thereof in the district court of the United States to which said action or proceeding was removed, be fined not more than \$1,000, or imprisoned not more than one year, or both. The district court to which any cause shall be removable under this chapter shall have power to issue a writ of certiorari to said State court commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this chapter for the removal of the same, and enforce said writ according to law. If it shall be impossible for the parties or persons removing any cause under this chapter, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the district court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty, as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said district court shall require the other party to plead, and said action or proceeding shall proceed to final judgment. The said district court may make an order requiring the parties thereto to plead de novo; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid. (Mar. 3, 1875, c. 137, §7, 18 Stat. 472; Mar. 3, 1911, c. 231, §39, 36 Stat. 1099.)"

28 U. S. C. A., Section 83:

"In all cases removed from any State court to any United States court for trial in which any one or more of the defendants has not been served with process or in which the same has not been perfected prior to such removal, or in which the process served upon the defendant or defendants, or any of them, proves to be defective, such process may be completed by the United States court through its officers, or new process as to defendants upon whom process has not been completed may be issued out of such United States court, or service may be perfected in such court in the same manner as in cases which are originally filed in such United States court. Nothing in this section shall be construed to deprive any defendant upon whom process is so served after removal, of his right to move to remand the cause to the State court, the same as if process had been served upon him prior to such removal. (Apr. 16, 1920, c. 146, 41 Stat. 554.)"

28 U. S. C. A., Section 724:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding. (R. S. §914.)"

28 U. S. C. A., Section 726:

"In common-law causes in the district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which were on June 1, 1872, provided by the laws of the State in which such court is held for the courts thereof; and such dis-

strict courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process. Similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy. (R. S. §915.)"

28 U. S. C. A., Section 777:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe. (R. S. §954.)"

## OHIO STATUTES

Bates Annotated Ohio Statutes, Fourth Edition, Section 4987:

"An action shall be deemed commenced, within the meaning of this chapter, as to each defendant, at the date of the summons which is served on him, or on a co-defendant who is a joint contractor, or otherwise united in interest with him; and when service by publication is proper, the action shall be



deemed commenced at the date of the first publication, if the publication be regularly made. (51 v. 57, §20; S. & C. 949.)”

Section 4988:

“An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this chapter, when the party diligently endeavors to procure a service; but such attempt must be followed by service within sixty days. And if the defendant is a corporation, whether foreign or created under the laws of this state, and whether the charter thereof prescribes the manner and place, or either, of service of process thereon, and such corporation passes into the hands of a receiver before the expiration of said sixty days, then service following such attempt to commence the action may, within said sixty days, be made upon such receiver, or his cashier, treasurer, secretary, clerk or managing agent, or if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such agents or officers of such receiver with the person having charge thereof; and if such corporation is a railroad company, summons may be served upon any regular ticket or freight agent of said receiver, and if there is no such agent, then upon any conductor of said receiver, in any county in the state in which such railroad is located, and the summons shall be returned as if served upon said defendant. 91 v. 72; 51 v. 57, §20; S. & C. 949.)”

Section 5537:

“The officer shall return upon every order of attachment what he has done under it, and the return must show the property attached, and the time it was attached; when garnishees are served, their names, and the time each was served, must be stated; and the officer shall return with the order all undertakings given under it. (51 v. 57, §204, S. & C. 1006.)”

## Ohio General Code Section 121:

“Who are ineligible.—No banker, broker, cashier, director, teller, or clerk of a bank, banker or broker, or other person holding an official relation to a bank, banker, or broker, shall be competent to act as notary public in any matter in which such bank, banker, or broker is interested. (R. S. §111.)”

## Ohio General Code Section 11,218:

“Lapse of time a bar.—A civil action, unless a different limitation is prescribed by statute, can be commenced only within the period prescribed in this chapter. When interposed by proper plea by a party to an action mentioned in this chapter, lapse of time shall be a bar thereto as herein provided. (R. S. §§4976, 4979; ~~29 O. S. 245; 30 O. S. 184.~~)”

## Ohio General Code Section 11,230:

“When commenced.—An action shall be deemed to be commenced within the meaning of this chapter, as to each defendant, at the date of the summons which is served on him or on a co-defendant who is a joint contractor, or otherwise united in interest with him. When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication, if it be regularly made. (R. S. §4987.)”

## Ohio General Code Section 11,231:

“When action deemed commenced.—Within the meaning of this chapter, an attempt to commence an action shall be deemed to be equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt be followed by service within sixty days. (R. S. §4988.)”

## Ohio General Code Section 11,279:

"Summons to issue on petition.—A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon. (R. S. §5032.)"

## Ohio General Code Section 11,292:

"Service by publication.—Service may be made by publication in any of the following cases:

"1. In an action for the recovery of real property or of an estate or interest therein, when the defendant is not a resident of this state or his place of residence can not be ascertained;

"2. In an action for the partition of real property, when the defendant is not a resident of this state or his place of residence can not be ascertained;

"3. In an action to foreclose a mortgage or to enforce a lien or other incumbrance or charge on real property, when the defendant is not a resident of this state or his place of residence can not be ascertained;

"4. In an action to compel the specific performance of a contract for the sale of real property, when the defendant is not a resident of this state or his place of residence can not be ascertained;

"5. In an action to establish or set aside a will, when the defendant is not a resident of this state or his place of residence can not be ascertained;

"6. In an action by an executor, administrator, guardian, or trustee seeking the direction of the court respecting the trust or property to be administered and the rights of the parties in interest, when the defendant is not a resident of this state or his place of residence can not be ascertained;

"7. In an action in which it is sought by a provisional remedy to take or to appropriate in any way property of the defendant, when the defendant is not a resident of this state or is a foreign corporation or his place of residence can not be ascertained;

"8. In an action against a corporation organized under the laws of this state, which has failed to elect officers or to appoint an agent upon whom service of summons can be made, and which has no place of doing business in this state;

"9. In an action which relates to or the subject of which is real or personal property in this state, when the defendant has or claims a lien thereon, or an actual or contingent interest therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is not a resident of this state, or is a foreign corporation, or his place of residence can not be ascertained;

"10. In an action against an executor, administrator, or guardian who has given bond as such in this state, but at the time of the commencement of the action is not a resident of this state or his place of residence can not be ascertained;

"11. In an action or proceeding for a new trial or other relief after judgment, or to impeach a judgment or order for fraud, or to obtain an order of satisfaction thereof, when the defendant is not a resident of this state or his place of residence can not be ascertained;

"12. In an action where the defendant, being a resident of this state, has departed from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent;

"13. In a proceeding in error when the defendant has no attorney of record in this state and is not a resident of and absent from this state, or has left the state to avoid the service of a summons in error, or so conceals himself that it can not be served upon him. (R. S. §5045.)"

#### Ohio General Code Section 11,295:

"How publication made.—The publication must be made for six consecutive weeks, in a newspaper printed in the county where the petition is filed.

When made in a daily newspaper, one insertion a week shall be sufficient. It must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer. (R. S. §5047.)"

Ohio General Code Section 11,524:

Before whom affidavit may be made.—An affidavit may be made in or out of this state before any person authorized to take depositions, and unless it is a verification of a pleading must be authenticated in the same way as a deposition.

\* "Such affidavit may be made before any person authorized to administer oaths whether an attorney in the case or not (116 v. 369; R. S. §5264. Eff. Aug. 30, 1935.)"

Ohio General Code Section 11,532:

"Who can not take depositions.—The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding. (R. S. 5271.)"

Ohio General Code Section 11819:

"*Grounds of attachment.* In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:

"1. Excepting foreign corporations which, by compliance with the law therefor, are exempted from attachment as such, that the defendant or one of several defendants is a foreign corporation;

"2. Is not a resident of this state;

"3. Has absconded with the intent to defraud his creditors;

"4. Has left the county of his residence to avoid the service of a summons;

\*This sentence added by amendment in 1933. First sentence constituted entire section in 1930.

"5. So conceals himself that a summons cannot be served upon him;

"6. Is about to remove his property, in whole or part, out of the jurisdiction of the court, with the intent to defraud his creditors;

"7. Is about to convert his property in whole or part, into money for the purpose of placing it beyond the reach of his creditors;

"8. Has property or rights in action, which he conceals;

"9. Has assigned, removed, disposed of, or is about to dispose of, his property, in whole or part, with the intent to defraud, his creditors;

"10. Has fraudulently or criminally contracted the debt, or incurred the obligations for which suit is about to be or has been brought; and

"11. That the claim is for work or labor, or for necessities.

"An attachment shall not be granted on the ground that the defendant is a foreign corporation or not a resident of this state, for any claim other than a debt or demand, arising upon contract, judgment or decree, or for causing damage to property or death or personal injury by negligent or wrongful act. (109 v. 59; R. S. §5521.)"

#### Ohio General Code Section 11820:

"*Affidavit for order of attachment*; contents. An order of attachment shall be made by the clerk of the court in which the action is brought, in any case mentioned in the next preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing:

"1. The nature of the plaintiff's claim;

"2. That it is just;

"3. The amount which the affiant believes the plaintiff ought to recover; and

"4. The existence of any one of the grounds for an attachment enumerated in such section.

\* "Such affidavit may be made before any person

\*This sentence added by amendment in 1935.



authorized to administer oaths whether an attorney in the case or not. (116 v. 369, R. S. §5522. Eff. Aug. 30, 1935.)”

Ohio General Code Section 11821:

*“When undertaking required.* When the ground of the attachment is that the defendant is a foreign corporation, or not a resident of this state, the order may be issued without a bond. In all other cases the order shall not be issued by the clerk until a bond is executed in his office, by sufficient surety of the plaintiff, to be approved by the clerk, in a sum equal to double the amount of the plaintiff’s claim, to the effect that he will pay the defendant all damages which he may sustain by reason of the attachment if the order proves to have been wrongfully obtained. (R. S. §5523.)”

Ohio General Code Section 11822:

*“Order of attachment.* The order of attachment shall be directed and delivered to the sheriff, and require him to attach the lands, tenements, goods, chattels, stocks or interest in stocks, rights credits, money, and effects of the defendant, in his county, not exempt by law from being applied to the payment of plaintiff’s claim, or so much thereof as will satisfy it, to be stated in the order as in the affidavit, and the probable costs of the action, not exceeding fifty dollars. (R. S. §5524.)”

Ohio General Code Section 11823:

*“Two or more attachments.* Orders of attachment may be issued to the sheriffs of different counties. Several of them, at the option of the plaintiff, may be issued at the same time or in succession. But such only as have been executed shall be taxed in the costs, unless otherwise directed by the court. (R. S. §5525.)”

## Ohio General Code Section 11824:

*"When returnable.* The return day of the order of attachment, when it is issued at the commencement of the action, shall be the same as that of the summons. When issued afterward, it shall be twenty days after it issued. (R. S. §5526.)"

## Ohio General Code Section 11825:

*"When several orders issue.* When there are several orders of attachment against the same defendant, they shall be executed in the order in which they were received by the sheriff. (R. S. §5527.)"

## Ohio General Code Section 11828:

*"Service of garnishee.* When the plaintiff, his agent or attorney, makes oath in writing that he has good reason to believe, and does believe, that any person, partnership, or corporation in the affidavit named, has property of the defendant in his possession, describing it, if the officer cannot get possession of such property, he must leave with such garnishee a copy of the order of attachment, with a written notice that he appear in court and answer, as hereinafter provided. When the garnishee does not reside in the county in which the order of attachment was issued, the process may be served by the proper officer of the county in which he resides, or be personally served. (R. S. §5530.)"

## Ohio General Code, Section 11833:

*"How garnishee served.—*If the garnishee is a person, a copy of the order and notice shall be served upon him personally, or left at his usual place of residence. When a partnership is garnisheed by its company name, they shall be left at its usual place of doing business, or with a member of such partnership; and if a corporation, with the president or other principal officer, or its sec-

retary, cashier or managing agent. If such corporation is a railroad company, the copies may be left with a regular ticket or freight agent thereof, in any county in which the railroad is located. (R. S. §5534.)”

Ohio General Code, Section 11835:

*“How subsequent attachments made.—*When the property is under attachment, attachments thereon under subsequent orders must be as follows:

“1. If it is real property, it shall be attached in the manner prescribed for executing attachment;

“2. If it is personal property, it shall be attached as in the hands of the officer, and be subject to any previous attachment;

“3. If a person be made a garnishee more than once with respect to the same indebtedness or liability, a copy of the order and notice shall be left with him in the manner prescribed for serving a garnishee. (R. S. §5536.)”

Ohio General Code, Section 11836:

*“Form of return.—*The officer shall return upon every order of attachment what he has done under it. The return must show the property attached and the time it was attached. When garnishees are served, their names, and the time each was served, must be stated. The officer shall return with the order all bonds given under it. (R. S. §5537.)”

Ohio General Code, Section 11837:

*“When property and garnishee bound.—*An order of attachment shall bind the property attached from the time of service. A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is served with the written notice herein-

before mentioned. But when property is attached in the hands of a consignee, his lien thereon shall not be affected by the attachment. (R. S. §5538.)"

Ohio General Code, Section 11843:

*"How attached property disposed of.*—The court, or a judge thereof in vacation, may make proper orders for the preservation of property during the pendency of a suit, and direct a sale of it when, because of its perishable nature, or the cost of its keeping, that will be for the benefit of the parties. The sale must be public, after such advertisement as is prescribed for the sale of like property on execution, and be made in such manner, and terms of credit, with security, as, having regard to the probable duration of the action, the court or judge directs. The sheriff shall hold and pay over all proceeds of the sale collected by him, and all money received by him from garnishees, under the same requirements and responsibilities of himself and sureties as are provided in respect to money deposited in lieu of bail. (R. S. §5544.)"

Ohio General Code, Section 11848:

*"Garnishee may pay money into court or to sheriff.*—A garnishee may pay the money owing by him to the defendant, or so much thereof as the court orders, to the officer having the attachment, or into court. He shall be discharged from liability to the defendant for money so paid, not exceeding the plaintiff's claim, and shall not be subjected to costs beyond those caused by his resistance of the claims against him. If he discloses the property in his hands, or the true amount owing by him and delivers or pays it according to the order of the court, he shall be allowed his costs. When any part of the earnings of the debtor is not exempt, the garnishee process shall remain in force from the time of its service until the trial of the cause to determine the claim, debt or demand

of the creditor and bind all such earnings due at the time of service, and which become due from that time until the trial of such cause. But the garnishee may pay to the debtor an amount equal to ninety per cent of such personal earnings, due when the process is served or becoming due thereafter until trial, and be released from any liability to such creditor therefor. (R. S. §5548.)”

Ohio General Code, Section 11851:

*“Action against the garnishee.*—If the garnishee fails to appear and answer, or if he appears and answers, and his disclosure is not satisfactory to the plaintiff, or if he fails to comply with the order of the court to deliver the property and pay the money owing into court, or to give the bond required in the next preceding section, the plaintiff may proceed against him by civil action. Thereupon such proceedings may be had as in other actions. Judgment may be rendered in favor of the plaintiff for the amount of property and credits of the defendant in possession of the garnishee, for what may appear to be owing by him to the defendant, and for the costs of the proceedings against the garnishee. (R. S. §5551.)”

Ohio General Code, Section 11853:

*“Judgment against garnishee.* Final judgment shall not be rendered against the garnishee until the action against the defendant in attachment is determined. If judgment be rendered therein for the defendant in attachment, the garnishee shall be discharged, and recover costs. If the plaintiff recovers, and the garnishee delivers up the property and credits of the defendant in his possession, and pays the money due from him, as the court orders, he must be discharged, and the costs of proceedings against him be paid out of the property and money so surrendered, or as the court deems right. (R. S. §5553.)”





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**APR 19 1939**

**CHARLES ELMORE CROPLEY**  
CLERK

**IN THE  
Supreme Court of the United States**

**October Term, 1938**

**No. 676**

**HORTON C. RORICK,**

*Petitioner,*

*vs.*

**DEVON SYNDICATE, LIMITED, A CANADIAN  
CORPORATION,**

*Respondent.*

**On Certiorari from United States Circuit Court of  
Appeals, Sixth Circuit**

**RESPONDENT'S BRIEF ON THE MERITS**

**APPENDIX C**

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**HENRY J. O'NEILL,**  
15 Broad St., New York, New York,

**FRED E. FULLER,**  
807 Ohio Bldg., Toledo, Ohio,

**FRED A. SMITH,**  
807 Ohio Bldg., Toledo, Ohio,

*Of Counsel.*



**IN THE  
Supreme Court of the United States**

October Term, 1938

---

No. 676

HORTON C. RORICK,

*Petitioner,*

*vs.*

DEVON SYNDICATE, LIMITED, A CANADIAN  
CORPORATION,

*Respondent.*

---

On Certiorari from United States Circuit Court of  
Appeals, Sixth Circuit

---

**RESPONDENT'S BRIEF ON THE MERITS  
APPENDIX C**

---

GEORGE D. WELLES,  
807 Ohio Bldg., Toledo, Ohio,  
*Counsel for Respondent*

MILLER, OWEN, OTIS & BAILLY,  
15 Broad Street, New York, New York,  
WELLES, KELSEY, COBOURN & HARRINGTON,  
807 Ohio Bldg., Toledo, Ohio,

HENRY J. O'NEILL,  
15 Broad St., New York, New York,

FRED E. FULLER,  
807 Ohio Bldg., Toledo, Ohio,

FRED A. SMITH,  
807 Ohio Bldg., Toledo, Ohio,  
*Of Counsel.*



**IN THE**  
**United States Circuit Court of Appeals**  
**FOR THE SIXTH CIRCUIT**

---

No. 7609

---

HORTON C. RORICK,

*Appellant,*

*vs.*

DEVON SYNDICATE, LIMITED, A CANADIAN  
CORPORATION,

*Appellee.*

---

Appeal from the United States District Court for the  
Northern District of Ohio, Western Division

---

**MOTION TO DISMISS APPEAL; NOTICE THEREOF;  
AND CERTIFIED COPIES IN SUPPORT  
THEREOF**

---

MILLER, OWEN, OTIS & BAILLY,  
15 Broad St., New York, N. Y.,  
WELLES, KELSEY, COBOURN & HARRINGTON,  
807 Ohio Bldg., Toledo, Ohio,  
*Attorneys for Appellee, Devon  
Syndicate, Limited, a Canadian  
Corporation.*

HENRY J. O'NEILL,  
15 Broad St., New York, N. Y.,  
GEORGE D. WELLES,  
FRED E. FULLER,  
FRED A. SMITH,  
807 Ohio Bldg, Toledo, Ohio,  
*Of Counsel.*





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**IN THE**  
**United States Circuit Court of Appeals**  
**FOR THE SIXTH CIRCUIT**

---

No. 7609

---

HORTON C. RORICK,

*Appellant,*

*vs.*

DEVON SYNDICATE, LIMITED, A CANADIAN  
CORPORATION,

*Appellee.*

---

**MOTION TO DISMISS APPEAL AND NOTICE  
THEREOF**

---

Now comes the appellee, Devon Syndicate, Limited, a Canadian corporation, and moves the court for an order dismissing the appeal filed herein, and for cause shows:

First. That the appellant has abandoned his appeal herein by filing a new action entitled "*Horton C. Rorick vs. Devon Syndicate, Limited,*" now pending in the District Court of the United States for the Northern District of Ohio, Western Division, as Cause No. 4172 At Law, based upon the same cause of action involved in this ap-

peal, and by attempting in said new action to secure new orders of attachment and garnishment upon the same indebtedness involved in this appeal.

Second. The appellant has acquiesced in the decision and order of the lower court by filing a new action entitled "*Horton C. Rorick vs. Devon Syndicate, Limited*," now pending in the District Court of the United States for the Northern District of Ohio, Western Division, as Cause No. 4172 At Law, based upon the same cause of action involved in this appeal, and by attempting in said new action to secure new orders of attachment and garnishment upon the same indebtedness involved in this appeal.

Certified copies of the pleadings and proceedings in said new action, together with a certificate of the clerk of the United States District Court for the Northern District of Ohio, Western Division, that said new action is pending and undisposed of are attached to and filed in support of this motion.

A separate brief in support of this motion is being filed herewith.

MILLER, OWEN, OTIS & BAILLY,  
WELLES, KELSEY, COBOURN & HARRINGTON,  
*Attorneys for Appellee, Devon Syndicate,  
Limited, a Canadian Corporation.*

HENRY J. O'NEILL,  
GEORGE D. WELLES,  
FRED E. FULLER,  
FRED A. SMITH,  
*Of Counsel.*

**NOTICE**

Messrs. Fraser, Effler, Shumaker & Winn,  
Attorneys for Appellant:

Please take notice that we will file the foregoing motion to dismiss the appeal taken in this cause, together with the attached certified copies of the pleadings and proceedings in the case of "*Horton C. Rorick vs. Devon Syndicate, Limited*," No. 4172 At Law, in the District Court of the United States for the Northern District of Ohio, Western Division, and the certificate of the clerk of said court that said cause is now pending and undisposed of, and the separate brief in support of said motion that is served upon you herewith; and that on the 12th day of November, A. D. 1938, or as soon thereafter as counsel can be heard, we shall submit the same to the Honorable Circuit Court of Appeals for the Sixth Circuit, at Covington, Kentucky, for decision.

MILLER, OWEN, OTIS & BAILLY,  
WELLES, KELSEY, COBURN & HARRINGTON,  
*Attorneys for Appellee, Devon Syndicate,  
Limited, a Canadian Corporation.*

**CERTIFIED COPIES OF PLEADINGS AND PROCEEDINGS IN THE CASE OF "HORTON C. RORICK VS. DEVON SYNDICATE, LIMITED," AT LAW No. 4172 IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION, AND THE CERTIFICATE OF SAID CLERK THAT SAID CAUSE IS NOW PENDING AND UNDISPOSED OF, FILED IN SUPPORT OF APPELLEE'S MOTION TO DISMISS APPEAL**

(Filed Oct. 1, 1936)

COURT OF COMMON PLEAS

No. 147,299

Horton C. Rorick,

vs.

Devon Syndicate, Limited.

Pleas before the Court of Common Pleas within and for the County of Lucas and State of Ohio at a term thereof begun and held at the Court House in the City of Toledo, on Monday the 6th day of April in the year of our Lord One Thousand Nine Hundred and Thirty-six.

Present Honorable James Austin, Jr., Honorable James S. Martin, Honorable Scott Stahl, Honorable Roy R. Stuart, Honorable Robert G. Gosline, Honorable John M. McCabe, Presiding Judges.

Be it remembered that heretofore, to-wit: On the 13th day of July, 1936, Plaintiff by His Attorneys filed in said Court a Petition in the above entitled cause which Petition is in the words and figures as follows, to-wit:



IN THE COURT OF COMMON PLEAS OF  
LUCAS COUNTY, OHIO

No. 147,299

Horton C. Rorick, 2263 Collingwood Avenue,  
Toledo, Ohio,

Plaintiff,

vs.

Devon Syndicate, Limited, Montreal,  
Canada,

Defendant.

PETITION

Now comes the plaintiff and says that the defendant Devon Syndicate, Limited (also sometimes known as Devon Syndicate, Ltd.) is a corporation organized and existing under the laws of the Dominion of Canada, the last known address of its principal office and place of business being Transportation Building in the City of Montreal, Province of Quebec, Dominion of Canada.

For its cause of action herein plaintiff says that one Paris E. Singer caused said Devon Syndicate, Limited, to be incorporated prior to January 1, 1926, and transferred to said corporation a large portion of his personal assets.

Plaintiff says that the said Paris E. Singer, either through his ownership or control of all of the stock of Devon Syndicate, Limited, was at all times hereinafter referred to until his death in actual control of various corporations, including among others, the Palm Beach Ocean Realty Company, The Ocean & Lake Realty Company, Everglades Club Hotel & Apartment Company and The Highland Glades Farms Company.

On or about April 8, 1926, said Paris E. Singer entered into a written contract with the plaintiff wherein and whereby this plaintiff continued to be employed by said Singer for the calendar years 1926 and 1927 as financial adviser for the said Singer and for all of the corporations controlled by him, including said defendant Devon Syndicate, Limited, Palm Beach Realty Company, The Ocean & Lake Realty Company, Everglades Hotel & Apartment Company and The Highland Glades Farms Company. Under and by virtue of the terms of said agreement, which was accepted by the plaintiff, it was provided that the services to be rendered by the plaintiff would largely be of an advisory nature, and that they were not in any way to conflict with plaintiff's duty as a partner of Spitzer Rorick & Company; and it was also agreed that the amount of compensation to be paid plaintiff should be fixed exclusively by the plaintiff, and the said Singer agreed to pay whatever amount was fixed by plaintiff with the limitation that the charge should not exceed Fifty Thousand Dollars (\$50,000.00) per year and expenses for the calendar years 1926 and 1927.

Plaintiff says he accepted said contract and entered upon the performance of said duties; that it was then discovered by both parties that the services rendered and to be rendered were of vastly greater extent and value than was contemplated by either party at the time of the making of said contract of April 8, 1926; that plaintiff and said Singer thereupon and shortly thereafter agreed that plaintiff should assume and perform the additional duties requested by said Singer, and the said contract of April 8, 1926, was modified to the extent that the limitation of Fifty Thousand Dollars (\$50,000.00) per year was

expressly removed, and it was agreed that no limitation would be placed upon the value of the services to be rendered, and that plaintiff should and would have the right to fix the value of said services, and the amount of compensation to be paid, and said Singer agreed that said compensation as fixed by plaintiff would be paid to plaintiff.

Plaintiff further says that the defendant Devon Syndicate Limited, in the month of August, 1926, agreed with the plaintiff that it would join with said Singer in the employment and compensation to be paid to plaintiff for the services rendered, and to be rendered as aforesaid, and on or about March 12, 1927, the defendant Devon Syndicate Limited ratified and approved said contract in writing and upon said day, in writing, in consideration of services already rendered and to be rendered by the plaintiff to said defendants and to the said corporations hereinbefore named, and other corporations owned and controlled by the defendant Devon Syndicate Limited, agreed that it would pay to the plaintiff for said services whatever amount the plaintiff should fix as the value thereof, and in such amounts and on such dates as in the sole discretion of the plaintiff would be fixed. It was the intent of the plaintiff and the defendant that the services rendered and to be rendered by the plaintiff referred to in both of said written contracts would be the same services and would be rendered to said Singer and the defendant and all of the interests or corporations owned or controlled by the said Singer, including the defendant.

Plaintiff says that following the expiration of the year 1927 he continued performing the same services for

said Singer and the defendant as aforesaid, by and with their full consent and approval down to the 12th day of June, 1930, at which time he resigned; that during all of said time, down to the 12th day of June, 1930, plaintiff fully performed his contracts; and rendered services as financial adviser and otherwise in connection with the properties aforesaid, to the full satisfaction and approval of said Paris E. Singer and the defendant; that during the period of employment and down to the time of his resignation, plaintiff devoted a very large amount of time to the work involved, and handled assets of said Paris E. Singer and the defendant estimated by them to be of more than Twenty Million Dollars (\$20,000,000) in value, and by reason of his efforts the properties of the said Paris E. Singer and the defendant and the other corporations which were intricately involved, were largely saved for said Paris E. Singer and the defendant and the other interests and corporations and the services, during all of said time, were accepted by said Paris E. Singer and the defendant and by them in every way ratified, confirmed and approved.

Plaintiff says that in accordance with the provisions of his said contracts, he has fixed the value of his services rendered under his employment in the amount of Four Hundred Thousand Dollars (\$400,000) in addition to expenses and credits received by plaintiff in connection with the performance of his duties under said contracts, and there is due him by virtue of said contracts of employment from the defendant the sum of Four Hundred Thousand Dollars (\$400,000) together with interest at the rate of six per cent (6%) per annum from the 12th day of June, 1930.

Wherefore plaintiff prays judgment against the defendant for the sum of Four Hundred Thousand Dollars (\$400,000) with interest thereon at the rate of six per cent (6%) per annum from the 12th day of June, 1930.

Fraser, Effler, Shumaker & Winn,  
Attorneys for Plaintiff.

State of Ohio, County of Lucas, ss.

H. C. Rorick, being first duly sworn, says that he is the plaintiff in the above entitled action; that he has read the foregoing petition; and that the facts and allegations therein contained are true as he verily believes.


Horton C. Rorick.

Sworn to before me and subscribed in my presence this 10th day of July, 1936.

(Seal)

Caroline McLaughlin,  
Notary Public, Lucas County, Ohio.

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On the 13th day of July, 1936, there was filed in said Court an Affidavit in Attachment and Garnishment in the above entitled cause which affidavit is in the words and figures as follows, to-wit:

IN THE COURT OF COMMON PLEAS OF  
LUCAS COUNTY, OHIO

No. 147,299

Horton C. Rorick,

Plaintiff,

vs.

Devon Syndicate, Limited,

Defendant.

AFFIDAVIT IN ATTACHMENT AND  
GARNISHMENT

State of Ohio, Lucas County, ss.

Horton C. Rorick, being first duly sworn, says that he is the plaintiff in the above captioned suit; that he has commenced a civil action in the Court of Common Pleas of Lucas County, Ohio, against Devon Syndicate Limited, a Canadian corporation, also sometimes known as Devon Syndicate, Ltd., on a debt arising upon contract, being an action to recover from said defendant certain monies due and owing to plaintiff herein under and by virtue of certain contracts between plaintiff and defendant, and the breach and refusal to perform thereof by defendant; that said claim is just and that affiant believes plaintiff should recover thereon from defendant the sum of Four Hundred Thousand Dollars (\$400,000.00) with interest at the rate of six per cent (6%) per annum from June 12, 1930.

Affiant further says that he has good reason to believe and does believe that The Spitzer Rorick Trust & Savings Bank, an Ohio banking corporation, with its principal office in the City of Toledo, Ohio, The Blue Heron Land Company and the Everglades Club Company, each of which is a Florida corporation, each with its principal office and place of business at 315 Superior Street, Toledo, Ohio, have monies, property and assets of defendant Devon Syndicate, Limited, in their possession and control, due and payable or to become due and payable to said defendant.

Without limiting the generality of the foregoing, affiant says that he has good reason to believe and does believe that The Spitzer Rorick Trust & Savings Bank is indebted to Devon Syndicate, Limited, on two special deposit accounts for Nine Thousand Two Hundred Fifty-five Dollars and Ninety-six Cents (\$9,255.96) and Twenty Thousand Two Hundred Fifty-eight Dollars and Twenty-four Cents (\$20,258.24), respectively; that said The Spitzer Rorick Trust & Savings Bank, Trustee under an agreement between said bank and Devon Syndicate, Limited, dated March 16, 1927, has collected for the benefit of and is indebted to Devon Syndicate, Limited, in the amount of Seventeen Thousand Five Hundred Seventy-six Dollars (\$17,576.00) as of January 24, 1936, and for such additional amounts as may have been collected under the terms of said agreement subsequent to said date.

Affiant further says that he has good reason to believe and does believe that the Everglades Club Company is indebted to the said Devon Syndicate, Limited, in the sum of Forty-four Thousand Eight Hundred Ninety-eight Dollars and Twenty Cents (\$44,898.20) with inter-

est, representing the balance due on a note for Two Hundred Thousand Dollars (\$200,000.00) dated October 22, 1926.

Affiant further says that he has good reason to believe and does believe that The Blue Heron Land Company is indebted to Devon Syndicaté, Limited, in the amount of Four Hundred Thousand Dollars (\$400,000.00), with interest on certain promissory notes issued by said The Blue Heron Land Company to said Devon Syndicate, Limited, in 1927, in the total aggregate amount of Four Hundred Thousand Dollars (\$400,000.00).

Affiant says that The Spitzer Rorick Trust & Savings Bank, The Blue Heron Land Company and The Everglades Club Company should receive notice of garnishment herein, and also The Spitzer Rorick Trust & Savings Bank, Trustee.

Affiant further says that Devon Syndicate, Limited, is a foreign corporation, organized and existing under the laws of the Dominion of Canada with its principal office in the City of Montreal, Province of Quebec; that it is not for any reason, statutory or otherwise, exempted from attachment; that it has not filed with the Secretary of State of the State of Ohio a statement required by General Code Section 8625-5 nor procured from said Secretary of State the license provided for by General Code Section 8625-4; that it is not within the exceptions contained within Division 1 of the General Code Section 11819, nor was it at the time of the occurrences referred to in the petition in this case, nor is it now qualified by law to do business in the State of Ohio; and that the facts set forth in this affidavit are true.

Horton Rorick.

Sworn to before me and subscribed in my presence  
this 13th day of July, 1936.

(Seal) S. K. Roberts,  
Notary Public, Lucas County, Ohio.

My commission expires February 6, 1938.

Thereupon an Order of Attachment in said cause was  
issued by the Clerk of said Court which Order of Attach-  
ment is in the words and figures as follows, to-wit:  
The State of Ohio, Lucas County

To the Sheriff of Lucas County, Greeting:

You are hereby commanded to attach and safely keep  
the Lands, Tenements, Goods, Chattels, Stocks, or inter-  
ests in Stocks, Rights, Credits, Moneys and Effects, in  
your County, of Devon Syndicate, Limited, not exempt  
by law from being applied to the payment of the claim of  
the Plaintiff Horton C. Rorick, or so much thereof as will  
satisfy his claim for Four Hundred Thousand Dollars  
(\$400,000.00) with interest at the rate of Six per cent  
(6%) per annum from June 12, 1930, and also for Fifty  
Dollars, the probable costs of this action.

And that you make due return of this order on the  
27th day of July A. D. 1936.

Witness Wm. F. Renz, Clerk of the Court of Common  
Pleas of said County of Lucas, this 13th day of July  
A. D. 1936.

(Seal)

Wm. F. Renz, Clerk,  
By Leona Addis, Deputy Clerk.

On the 14th day of July, 1936, said Order of Attachment was filed with the Sheriff's Return thereon written as follows, to-wit:

Office Sheriff Lucas County, Ohio:

Received this writ July 13th, 1936, there being no goods or chattels, lards or tenements found by me in Lucas County, Ohio, belonging to the within named Devon Syndicate, Limited, on which to levy, this writ is hereby returned no money made, not satisfied.

Jas. M. O'Reilly, Sheriff,  
By Jay Gilday, Deputy.

Given under our hands this 14th day of July, A. D. 1936.

Jas. M. O'Reilly, Sheriff,  
By Jay Gilday, Deputy.

Endorsed on said Petition and filed therewith was a Praecipe for Summons in said cause which Praecipe is in the words and figures as follows, to-wit:

**PRAECIPE**  
**No. 147,299**

To the Clerk:

Please issue summons in the above entitled action to the Sheriff of Lucas County for the defendant Devon Syndicate, Limited. Endorse thereon: "Action for money only—amount claimed \$400,000 with interest at 6% per annum from June 12, 1930," and make the same returnable according to law.

Fraser, Effler, Shumaker & Winn,  
Attorneys for Plaintiff.

Thereupon a Summons in said cause was issued by the Clerk of said court which Summons is in the words and figures as follows, to-wit:

The State of Ohio, Lucas County ss.

To the Sheriff of Lucas County:

You are commanded to notify Devon Syndicate Limited, that it has been sued by Horton C. Rorick, in the Court of Common Pleas of Lucas County, and that unless it answer by the 15th day of August 1936, the Petition of said Plaintiff against it filed in the Clerk's Office of the said Court, such Petition will be taken as true and judgment rendered accordingly.

You will make due return of this Summons on the 27th day of July A. D. 1936.

Witness Wm. F. Renz, Clerk of our said Court, and the seal thereof hereto affixed at Toledo, this 13th day of July, A. D. 1936.

(Seal)

Wm. F. Renz, Clerk,  
By Leona Addis, Deputy.

Said summons was endorsed as follows, to-wit:

### SUMMONS

In action for money only amount claimed \$400,000 with interest at 6% per annum from June 12, 1930.

Fraser, Effler, Shumaker & Winn,  
Attorneys for Plaintiff.

On the 13th day of July 1936, said Summons was filed with the Sheriff's Return thereon written as follows, to-wit:

The State of Ohio, Lucas County, ss.

Received this writ July 13th, 1936 and pursuant to its command I summoned on the .. day of ....., 193...



the within named defendant Devon Syndicate Limited could not be found by me in Lucas County, Ohio.

Jas. M. O'Reilly, Sheriff,  
A. Sattler, Deputy.

Thereupon a Notice to Garnishee in said cause was issued by the Clerk of said Court which Notice to Garnishee is in the words and figures as follows, to-wit:

**NOTICE TO GARNISHEE**

**Horton C. Rorick,**

**vs.**

**Devon Syndicate, Limited,**

State of Ohio, Lucas County, ss.

To the Sheriff of said County, Greetings:

We command you to notify The Spitzer Rorick Trust & Savings Bank, The Spitzer Rorick Trust & Savings Bank, Trustee, The Blue Heron Land Company, Everglades Club Company, to appear before the Honorable Court of Common Pleas of said County at the Court House in Toledo, on or before the 15th day of August A. D. 1936 and answer under oath all questions put to them touching the property of every description, and credits of the Defendant Devon Syndicate, Limited, in their possession or under their control and they shall disclose truly the amount owing by them to said defendant whether due or not.

The Sheriff will make due return of this writ on the 27th day of July A. D. 1936.

Witness my hand and the Seal of said Court this  
13th day of July A. D. 1936.

Wm. F. Renz,  
Clerk of the Court of Common Pleas of  
Lucas County, Ohio,  
By Leona Addis, Deputy.

On the 27th day of July 1936, said Notice to Garnishee was filed with the Sheriff's Return thereon written as follows, to-wit:

### SHERIFF'S RETURN

State of Ohio, Lucas County, ss.

Received this writ July 13th, 1936 at .. o'clock .. M., and pursuant to its command I notified on the 14th day of July 1936, at .. o'clock .. M., the within named The Spitzer Trust and Savings Bank, by delivering to Marvin Rorick, Vice President and the person in charge of office at time of service of the within named The Spitzer Rorick Trust and Savings Bank, a true and certified copy of this writ with all endorsements thereon. The President, or other Chief Officer, or Cashier, Secretary, Treasurer, Managing Agent, or Clerk, could not be found by me in Lucas County, Ohio. I also summoned on the 14th day of July, 1936, the within named The Spitzer Rorick Trust & Savings Bank, Trustee, by delivering to Marvin Rorick Vice President and the person in charge of the within named The Spitzer Rorick Trust and Savings Bank, Trustee, a true and certified copy of this writ with all endorsements thereon. The President, other chief officer, or Cashier, Secretary, Treasurer, Managing Agent, or Clerk, could not be found by me in Lucas County, Ohio.

I also summoned on the 14th day of July, 1936, the within named The Blue Heron Land Company, by delivering to Marvin Rorick, Secretary-Treasurer of the within named The Blue Heron Land Company, a true and certified copy of this writ with all endorsements thereon. The President or other Chief Officer, or Cashier, Managing Agent, or Clerk, could not be found by me in Lucas County, Ohio. I also summoned on the 14th day of July 1936, the within named Everglades Club Company, by delivering to J. R. Easton, Secretary-Treasurer of the within named Everglades Club Company, a true and certified copy of this writ with all endorsements thereon. The President or other Chief Officer, or Cashier, Managing Agent, or Clerk could not be found by me in Lucas County, Ohio.

Jas. M. O'Reilly, Sheriff,

By A. Sattler, Deputy.

On the 14th day of July 1936, there was filed in said court an Affidavit for Constructive Service in the above entitled cause which Affidavit is in the words and figures as follows, to-wit:

IN THE COURT OF COMMON PLEAS  
OF LUCAS COUNTY, OHIO

No. 147,299

Horton C. Rorick,

Plaintiff,

vs.

Devon Syndicate, Limited,

Defendant.

AFFIDAVIT FOR CONSTRUCTIVE SERVICE

State of Ohio, Lucas County, ss.

Horton C. Rorick, being first duly sworn, says that he is the plaintiff in the above entitled action; that defendant, Devon Syndicate, Limited, also sometimes known as Devon Syndicate, Ltd., is a foreign corporation organized and existing under and by virtue of the laws of the Dominion of Canada, with its principal office and place of business in the Transportation Building in the City of Montreal, Province of Quebec, Dominion of Canada; that it is not a resident or a citizen of the State of Ohio; nor does it maintain an office or place of business in the State of Ohio; that service of summons cannot be made upon said defendant in the State of Ohio; that this action is one in which it is sought by provisional remedies of attachment and/or garnishment to take and to appropriate

property of said defendant, Devon Syndicate, Limited, in the possession of defendants and within the jurisdiction of this court and to subject the same to the satisfaction of plaintiff's claim, and comes within the provisions of General Code Sec. 11292 of the laws of Ohio, wherein service by publication may be made on said defendant.

Horton C. Rorick.

Sworn to before me and subscribed in my presence this 11th day of July 1936.

S. K. Roberts,

(Seal)

Notary Public, Lucas County, Ohio.

My Commission Expires Feb. 6, 1938.

On the 15th day of July, 1936, as appears on the Appearance Docket of said court, notice mailed Devon Syndicate, Limited, also known as Devon Syndicate, Ltd., a foreign corporation of Quebec, Dominion of Canada.

On the 16th day of July 1936, there was filed in said court a Praecipe for Second Order of Attachment and Garnishment in the above entitled cause which Praecipe is in the words and figures as follows, to-wit:

IN THE COURT OF COMMON PLEAS  
OF LUCAS COUNTY, OHIO

No. 147,299

Horton C. Rorick,

Plaintiff,

vs.

Devon Syndicate, Limited,

Defendant.

PRAECIPE FOR SECOND ORDER OF  
ATTACHMENT AND GARNISHMENT

To the Clerk:

Please issue to the Sheriff of Lucas County, Ohio, a second order of attachment and garnishment in the above entitled action for each of the following corporations named as garnishees in the affidavit in attachment and garnishment heretofore filed herein.

The Spitzer Rorick Trust & Savings Bank,

315 Superior Street, Toledo Ohio;

The Spitzer Rorick Trust & Savings Bank, Trustee,

315 Superior Street, Toledo Ohio;

The Blue Heron Land Company,

315 Superior Street, Toledo Ohio;

Everglades Club Company,

315 Superior Street, Toledo Ohio;

and make the same returnable according to law.

Horton C. Rorick,

By Fraser, Effler, Shumaker & Winn,

His Attorneys.



Thereupon an Order of Attachment in said cause was issued by the Clerk of said court which Order of Attachment is in the words and figures as follows, to-wit:

The State of Ohio, Lucas County.  
To the Sheriff of Lucas County, Greeting:

You are hereby commanded to attach and safely keep the Lands, Tenements, Goods, Chattels, Stocks, or interest in Stocks, Rights, Credits, Moneys and Effects, in your County of Devon Syndicate, Limited, not exempt by law from being applied to the payment of the claim of the Plaintiff Horton C. Rorick, or so much thereof as will satisfy his claim for Four Hundred Thousand Dollars (\$400,000.00) with interest at the rate of six per cent (6%) per annum from June 12, 1930, and also for Fifty Dollars the probable costs of this action.

And that you make due return of this order on the 4th day of August A.D. 1936.

Witness Wm. F. Renz, Clerk of the Court of Common Pleas of said County of Lucas this 16th day of July, A. D. 1936.

(Seal)

Wm. F. Renz, Clerk,  
Leona Addis, Deputy Clerk

On the 20th day of July 1936, said Order of Attachment was filed with the Sheriff's Return thereon written as follows, to-wit:

Office Sheriff, Lucas County, Ohio:

Received this writ July 17th, 1936, there being no goods or chattels, lands or tenements found by me in Lucas County, Ohio, belonging to the within named Devon Syndicate, Limited, on which to levy, this writ is hereby returned no money made, not satisfied.

Jas. M. O'Reilly, Sheriff,

By Jay Gilday, Deputy.

Given under our hands this 20th day of July, A. D.

1936.

Jas. M. O'Reilly, Sheriff,

Jay Gilday, Deputy.

Thereupon a Notice of Garnishee in said cause was issued by the clerk of said court which Notice to Garnishee is in the words and figures as follows, to-wit:

### NOTICE TO GARNISHEE

Horton C. Rorick

vs.

Devon Syndicate, Limited.

State of Ohio, Lucas County, ss.

To the Sheriff of Said County, Greeting:

We command you to notify The Spitzer Rorick Trust & Savings Bank, The Spitzer Rorick Trust & Savings Bank, Trustee, The Blue Heron Land Company, Everglades Club Company, to appear before the Honorable Court of Common Pleas of said county at the Court House in Toledo, on or before the 15th day of August, A. D. 1936, and answer, under oath, all questions put to him touching the property of every description and credits of the defendants in their possession or under their control and they shall disclose truly the amount owing by them to said defendant whether due or not.

The sheriff will make due return of this writ on the 27th day of July, A.D. 1936.

Witness my hand and the seal of said court, this 16th day of July, A. D. 1936.

Wm. F. Renz,

(Seal)

Clerk of the Court of Common Pleas of  
Lucas County, O.,  
By Leona Addis, Deputy.

On the 27th day of July, 1936, said Notice to Garnishee was filed with the sheriff's return thereon written as follows, to-wit:

### SHERIFF'S RETURN

State of Ohio, Lucas County, ss.

Received this writ July 17th, 1936, at ... o'clock ... M., and pursuant to its command I notified on the 20th day of July, 1936, at ... o'clock ... M., the within named The Spitzer Rorick Trust & Savings Bank by delivering to Marvin H. Rorick, vice-president, and the person in charge of office at time of service of the within named defendant The Spitzer Rorick Trust & Savings Bank, a true and certified copy of this writ with all endorsements thereon, together with copy of attachment. The president or other chief officer or cashier, secretary, treasurer, managing agent, or clerk, could not be found by me in Lucas County, Ohio. I also summoned on the 20th day of July, 1936, the within named The Spitzer Rorick Trust & Savings Bank, Trustee, by delivering to Marvin H. Rorick, vice-president, and the person in charge of office at time of service of the within named defendant The Spitzer Rorick Trust & Savings Bank, Trustee, a true and certified copy of this writ with all endorsements thereon, together with copy of attachment. The president or other chief officer, or cashier, secretary, treasurer, managing agent, or clerk, could not be found by me in Lucas County, Ohio. I also summoned on the 20th day of July, 1936, the within named defendant The Blue Heron Land Company by delivering to Marvin H. Rorick, secretary-treasurer of the within named defendant The Blue Heron Land Company, a true and certified copy of

this writ with all endorsements thereon, together with copy of attachment. The president, or other chief officer, or cashier, managing agent, or clerk, could not be found by me in Lucas County, Ohio. I also summoned on the 20th day of July, 1936, the within named defendant Everglades Club Company, by delivering to J. R. Easton, secretary-treasurer of the within named defendant Everglades Club Company, a true and certified copy of this writ with all endorsements thereon, together with copy of attachment. The President or other chief officer, or cashier, managing agent, or clerk, could not be found by me in Lucas County, Ohio.

Jas. M. O'Reilly, Sheriff,  
By A. Sattler, Deputy.

On the 19th day of August, 1936, there was filed in said court a Notice and Affidavit of Publication in the above entitled cause, which Notice and Affidavit are in the words and figures as follows, to-wit:

IN THE COURT OF COMMON PLEAS, LUCAS  
COUNTY, OHIO

No. 147,299

Horton C. Rorick,

Plaintiff,

vs.

Devon Syndicate, Limited,

Defendant.

LEGAL NOTICE

Devon Syndicate, Limited, also sometimes known as Devon Syndicate, Ltd., a foreign corporation organized and existing under the laws of the Dominion of Canada, whose last known address of its principal office and place of business was the Transportation Building in the City of Montreal, Province of Quebec, Dominion of Canada, will take notice that on the 13th day of July, 1936, the plaintiff, Horton C. Rorick, filed his petition against it in the Court of Common Pleas of Lucas County, Ohio, the same being Cause No. 147299 on the docket of said court, for the procurement by plaintiff against said defendant of a judgment for services rendered based upon contract, all of which is more fully set forth in plaintiff's petition, together with his affidavit in attachment and garnishment

on which said affidavit orders of attachment and garnishment and notices to garnishees have been issued by the clerk of said court and served on The Spitzer Rorick Trust & Savings Bank, Toledo, Ohio, The Spitzer Rorick Trust & Savings Bank, Trustee, Toledo, Ohio, Everglades Club Company, Toledo, Ohio, and Blue Heron Land Company, Toledo, Ohio, attaching and garnishing moneys, property and assets of defendant in their possession and control due and payable or to become due and payable from said defendant, said moneys, property and assets being more particularly described in said affidavit in attachment and garnishment. Said garnishees are required to file their answers herein on or before the 15th day of August, 1936.

The prayer of said petition is for judgment in favor of plaintiff and against defendant Devon Syndicate, Limited, in the sum of Four Hundred Thousand Dollars (\$400,000.00) with interest thereon at the rate of six per cent (6%) per annum from June 12, 1930, and his costs of suit.

Said defendant is required to answer said petition on or before the 5th day of September, 1936, or judgment will be taken against it.

Horton C. Rorick, Plaintiff,  
By Fraser, Effler, Shumaker & Winn,

His Attorneys.

Toledo, Ohio, July 14, 1936.

7-15 8-19 6wed



## PROOF OF PUBLICATION

State of Ohio, County of Lucas, ss.

H. J. Chittenden, being first duly sworn, says that he is the owner and publisher of Toledo Legal News, a daily newspaper, printed and of general circulation in said Lucas County, Ohio; that the annexed notice was published in said Toledo Legal News once each week for six consecutive weeks, beginning on the 15th day of July, 1936, and that each insertion of said notice in said newspaper was on the same day of each week.

H. J. Chittenden.

Subscribed in my presence and sworn to before me this 19th day of August, 1936.

(Seal) Hazel L. Hilton,  
Notary Public, Lucas County, Ohio.

On the 2nd day of September, 1936, there was filed in said court a Motion for Removal in the above entitled cause which motion is in the words and figures as follows, to-wit:

IN THE COURT OF COMMON PLEAS OF LUCAS  
COUNTY, OHIO

No. 147,299

Horton C. Rorick,

Plaintiff,

vs.

Devon Syndicate, Limited,

Defendant.

MOTION FOR REMOVAL

Now comes the defendant and appearing solely for the purpose of removing this said cause, and for no other purpose, and not intending thereby to waive any question of the sufficiency of service or the want of service on it, but expressly reserving all questions of service, jurisdiction and want of service on it, and not entering or intending to enter its appearance herein, moves the court for an order removing this said cause to the District Court of the United States for the Northern District of Ohio, Western Division, in accordance with the petition for removal filed herein.

Miller, Owen, Otis & Bailly,  
Welles, Kelsey & Cobourn,  
Attorneys for Defendant.

On the 2nd day of September, 1936, there was filed in said court a Notice of Removal in the above entitled cause, which notice is in the words and figures as follows, to-wit:

IN THE COURT OF COMMON PLEAS OF LUCAS  
COUNTY, OHIO

No. 147,299

Horton C. Rorick,

Plaintiff,

vs.

Devon Syndicate, Limited,

Defendant.

NOTICE OF REMOVAL

The plaintiff will take notice that the defendant has prepared a petition and bond for the removal of this cause to the District Court of the United States for the Northern District of Ohio, Western Division, which petition and bond said defendant will file herein and present to said Court of Common Pleas of Lucas County, Ohio, in which said action is pending, on the 2nd day of Sept., 1936, at 9 A.M. True copies of said petition and bond are hereto attached.

Miller, Owen, Otis & Bailly,

Welles, Kelsey & Cobourn,

Attorneys for Defendant.

A copy of this notice, with copies of petition and bond for removal, has been received this 2nd day of September, 1936, by the undersigned, counsel for the plaintiff herein.

Fraser, Effler, Shumaker & Winn,

Attorneys for Plaintiff.

IN THE COURT OF COMMON PLEAS OF LUCAS  
COUNTY, OHIO

No. 147,299-

Horton C. Rorick,

Plaintiff

vs.

Devon Syndicate, Limited,

Defendant.

PETITION FOR REMOVAL TO THE DISTRICT  
COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF OHIO, WESTERN  
DIVISION

Petitioner herein, being the defendant in the above entitled action, appearing specially for the purpose of this petition only, and not intending hereby to waive any question of the sufficiency of service of process or the want of service of process on it, but expressly reserving all questions of service of process, jurisdiction and want of service of process on it, and not entering or intending to enter its appearance herein, respectfully shows to this Honorable Court that the controversy herein is one wholly between a citizen and resident of the State of Ohio and a citizen and subject of a foreign state; that the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of Five Thousand Dollars (\$5,000.00); that the suit is one of a civil nature at common law; and does not arise under an act of the United States of America entitled "An act relating to the liability of common carriers by railroad to their employees in

certain cases," approved April 22, 1908, or any amendment thereto, now Sections 51 to 59 of Title 45 of the Code of Laws of the United States of America.

Said petitioner says that said suit was filed in this said court July 13, 1936, and that service of summons on the defendant herein was returned "not found." That plaintiff then sought by attachment and garnishment to seize property of defendants, and thereupon, to-wit. on the 14th day of July, 1936, filed an affidavit in the attempt to make service by publication on said defendant and caused publications thereof to be issued. That the time within which defendant is required to appear and plead, answer or demur as stated in said notice and as provided by the laws of the State of Ohio, or any rule of this court, is the 5th day of September, 1936, and that said time has not yet expired.

Said petitioner further represents to the court that at the time said suit was commenced and at all times thereafter, defendant, petitioner herein, Devon Syndicate, Limited, was and now is a corporation organized and existing under the laws of the Dominion of Canada, having its principal office at 2000 Aldred Building, 507 Place d'Armes (formerly in the Transportation Building) in the City of Montreal, Province of Quebec, Dominion of Canada, and that said defendant, petitioner herein, was and is a citizen of the Dominion of Canada and subject of Great Britain and was and is an alien and not a citizen of the United States of America nor a citizen or resident of the State of Ohio, nor of any other state of the United States of America.

Petitioner further states that plaintiff, Horton C.

Rorick, at the time said suit was filed and at all times thereafter, was and now is an individual residing in the City of Toledo, Lucas County, Ohio, and is a citizen and resident of the State of Ohio.

Petitioner further states that the said cause is brought by plaintiff herein, Horton C. Rorick, to recover from said defendant the sum of Four Hundred Thousand Dollars (\$400,000) that plaintiff alleges to be due from said defendant by reason of services claimed by plaintiff to have been performed by plaintiff for and on behalf of defendant in the State of Florida, under alleged contracts by which plaintiff claims he was to be paid for said services whatever sum plaintiff should determine was the value thereof; and that your petitioner desires to remove said suit to the District Court of the United States for the Northern District of Ohio, Western Division.

Petitioner herewith files a good and sufficient bond under the statutes in such cases made and provided conditioned as the law directs that it will within thirty (30) days from the filing of the petition for removal file a certified copy of the record of this cause in the District Court of the United States for the Northern District of Ohio, Western Division, and for the payment of all costs which may be awarded by said court if said the District Court shall determine this suit is improperly and wrongfully removed thereto.

Wherefore your petitioner prays that this cause proceed no further herein except to order a removal of this cause to the said District Court of the United States for the Northern District of Ohio, Western Division, as required by law and to accept the bond herewith presented

and direct the clerk of this court to provide a certified transcript of the record of this cause as required by law.

Miller, Owen, Otis & Bailly,  
Welles, Kelsey & Cobourn,  
Attorneys for Defendants.

State of Ohio, Lucas County, ss:

Geo. D. Welles, being first duly sworn, on his oath, says that he is a member of the firm of Welles, Kelsey & Cobourn, and is one of the attorneys for the defendant in the above entitled action; that said defendant is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, and that no officer of said defendant is now within the State of Ohio; and that he has read the foregoing petition for removal and that the facts stated therein are true.

(Signed) Geo. D. Welles.

Sworn to before me and subscribed in my presence this 2nd day of Sept., 1936.

(Signed) Margaret Mobley,  
Notary Public, Lucas County, Ohio.

My commission expires Nov. 30, 1936.



IN THE COURT OF COMMON PLEAS OF LUCAS  
COUNTY, OHIO

No. 147,299

Horton C. Rorick,

Plaintiff,

vs.

Devon Syndicate, Limited,

Defendant.

BOND ON REMOVAL

Know all men by these presents that Devon Syndicate, Limited, a corporation organized and existing under the laws of the Dominion of Canada as principal, and Fidelity & Deposit Company of Maryland as surety, are held and firmly bound unto Horton C. Rorick, plaintiff in the above entitled action, his successors and assigns, in the sum of Five Hundred Dollars (\$500.00) lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves and our successors jointly and severally by these presents.

The condition of this obligation is such that whereas said Devon Syndicate, Limited, has made and filed its petition, duly verified, in the above entitled suit in the Court of Common Pleas of Lucas County, Ohio, and has so filed the same prior to the time said defendant is required by the laws of the State of Ohio or any rule of said state court, in which said suit has been brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of the above entitled suit into

the District Court of the United States for the Northern District of Ohio, Western Division, being the district where such suit is pending, for further proceedings on grounds in said petition set forth, and has in said petition prayed that all future proceedings in said action in said Court of Common Pleas of Lucas County, Ohio, be stayed, except the granting of an order for the removal of said cause to said District Court of the United States, accepting this bond and directing the clerk to provide a certified transcript of the record therein, as required by law.

Now, therefore, if petitioner, the said Devon Syndicate, Limited, shall enter or cause to be entered in said District Court of the United States for the Northern District of Ohio, Western Division, within thirty (30) days from the date of filing said petition for removal, a certified copy of the record in said suit and shall pay or cause to be paid all costs that may be awarded by the said District Court of the United States if said District Court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to remain in full force and effect.

Witness our hands and seals this 2nd day of September, 1936.

Devon Syndicate, Limited,

Principal,

By Geo. D. Welles,

Attorney in Fact and of Record.

Fidelity & Deposit Company of Maryland,

Surety.

By .....

State of Ohio, County of Lucas, ss:

Geo. D. Welles, being first duly sworn, says that he has been duly and expressly authorized in writing by Devon Syndicate, Limited, the defendant in whose name, as principal, he has executed the foregoing bond on removal, to execute said bond in its name and on its behalf.

(Signed) Geo. D. Welles.

Sworn to before me and subscribed in my presence this 2nd day of Sept. 1936.

Margaret Mobley,

Notary Public, Lucas County, Ohio.

My Commission Expires Nov. 30, 1936.

On the 2nd day of September, 1936, defendant by Its Attorneys filed in said court a Petition for Removal of said cause to the District Court of the United States, Northern District of Ohio, Western Division, which Petition for Removal is in the words and figures as follows to-wit:

IN THE COURT OF COMMON PLEAS  
OF LUCAS COUNTY, OHIO.

No. 147,299

Horton C. Rorick,

Plaintiff,

vs.

Devon Syndicate, Limited,

Defendant.

PETITION FOR REMOVAL TO THE DISTRICT  
COURT OF THE UNITED STATES FOR THE  
NORTHERN DISTRICT OF OHIO,  
WESTERN DIVISION

Petitioner herein, being the defendant in the above entitled action, appearing specially for the purpose of this petition only, and not intending hereby to waive any question of the sufficiency of service of process or the want of service of process on it, but expressly reserving all questions of service of process, jurisdiction and want of service of process on it, and not entering or intending to enter its appearance herein, respectfully shows to this Honorable Court that the controversy herein is one wholly between a citizen and resident of the State of Ohio

and a citizen and subject of a foreign state; that the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of Five Thousand Dollars (\$5,000.00); that the suit is one of a civil nature at common law; and does not arise under an act of the United States of America entitled, "An act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908, or any amendment thereto, now Sections 51 to 59 of Title 45 of the Code of Laws of the United States of America.

Said petitioner says that said suit was filed in this said court July 13, 1936, and that service of summons on the defendant herein was returned "not found." That plaintiff then sought by attachment and garnishment to seize property of defendants and thereupon, to-wit, on the 14th day of July, 1936, filed an affidavit in the attempt to make service by publication on said defendant and caused publications thereof to be issued. That the time within which defendant is required to appear and plead, answer or demur as stated in said notice and as provided by the laws of the State of Ohio, or any rule of this court, is the 5th day of September, 1936, and that said time has not yet expired.

Said petitioner further represents to the court that at the time said suit was commenced, and at all times thereafter, defendant, petitioner herein, Devon Syndicate, Limited, was and now is a corporation organized and existing under the laws of the Dominion of Canada, having its principal office at 2000 Aldred Building, 507 Place d'Armes (formerly in the Transportation Building), in the City of Montreal, Province of Quebec, Dominion of Canada, and that said defendant, petitioner herein, was

and is a citizen of the Dominion of Canada and a subject of Great Britain and was and is an alien and not a citizen of the United States of America nor a citizen or resident of the State of Ohio nor of any other state of the United States of America.

Petitioner further states that plaintiff, Horton C. Rorick, at the time said suit was filed and at all times thereafter, was and now is an individual residing in the City of Toledo, Lucas County, Ohio, and is a citizen and resident of the State of Ohio.

Petitioner further states that the said cause is brought by plaintiff herein, Horton C. Rorick, to recover from said defendant the sum of Four Hundred Thousand Dollars (\$400,000) that plaintiff alleges to be due from said defendant by reason of services claimed by plaintiff to have been performed by plaintiff for and on behalf of defendant in the State of Florida, under alleged contracts by which plaintiff claims he was to be paid for said services whatever sum plaintiff should determine was the value thereof; and that your petitioner desires to remove said suit to the District Court of the United States for the Northern District of Ohio, Western Division.

Petitioner herewith files a good and sufficient bond under the statutes in such cases made and provided conditioned as the law directs that it will within thirty (30) days from the filing of the petition for removal file a certified copy of the record of this cause in the District Court of the United States for the Northern District of Ohio, Western Division, and for the payment of all costs which may be awarded by said court if said the District Court shall determine this suit is improperly and wrongfully removed thereto.

Wherefore your petitioner prays that this cause proceed no further herein except to order a removal of this cause to the said District Court of the United States for the Northern District of Ohio, Western Division, as required by law and to accept the bond herewith presented and direct the Clerk of this court to provide a certified transcript of the record of this cause as required by law.

Miller, Owen, Otis & Bailly,  
Welles, Kelsey & Cobourn,  
Attorneys for defendants.

State of Ohio, Lucas County, ss:

Geo. D. Welles, being first duly sworn, on his oath says that he is a member of the firm of Welles, Kelsey & Cobourn, and is one of the attorneys for the defendant in the above entitled action; that said defendant is a corporation organized and existing under and by virtue of the laws of the Dominion of Canada, and that no officer of said defendant is now within the state of Ohio, and that he has read the foregoing petition for removal and that the facts stated therein are true.

Geo. D. Welles.

Sworn to before me and subscribed in my presence this 2d day of Sept., 1936.

(Seal) Margaret Mobley,  
Notary Public, Lucas County, Ohio.  
My Commission Expires Nov. 30, 1936.



On the 2nd day of September, 1936, there was filed in said court a Bond for Removal of said cause, to the District Court of the United States, Northern District of Ohio, Western Division, which Bond for Removal is in the words and figures as follows, to-wit:

IN THE COURT OF COMMON PLEAS  
OF LUCAS COUNTY, OHIO

No. 147,299

Horton C. Rorick,

Plaintiff,

vs.

Devon Syndicate, Limited,

Defendant.

BOND ON REMOVAL

Know all men by these presents that Devon Syndicate, Limited, a corporation organized and existing under the laws of the Dominion of Canada, as principal, and Fidelity & Deposit Company of Maryland as surety are held and firmly bound unto Horton C. Rorick, plaintiff in the above entitled action, his successors and assigns, in the sum of Five Hundred Dollars (\$500.00) lawful money of the United States, for the payment of which well and truly be made, we bind ourselves and our successors jointly and severally by these presents.

The condition of this obligation is such that whereas said Devon Syndicate, Limited, has made and filed its petition, duly verified, in the above entitled suit in the Court of Common Pleas of Lucas County, Ohio, and has so filed the same prior to the time said defendant is required by the laws of the State of Ohio, or any rule of

said State court, in which said suit has been brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of the above entitled suit into the District Court of the United States for the Northern District of Ohio, Western Division, being the District where such suit is pending, for further proceedings on grounds in said petition set forth, and has in said petition prayed that all future proceedings in said action in said Court of Common Pleas of Lucas County, Ohio, be stayed, except the granting of an order for the removal of said cause to said District Court of the United States, accepting this bond and directing the Clerk to provide a certified transcript of the record therein, as required by law.

Now, therefore, if petitioner, the said Devon Syndicate, Limited, shall enter or cause to be entered in said District Court of the United States for the Northern District of Ohio, Western Division, within thirty (30) days from the date of filing said petition for removal, a certified copy of the record in said suit and shall pay or cause to be paid all costs that may be awarded by the said District Court of the United States; if said District Court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to remain in full force and effect.

Witness our hands and seals this 2nd day of September, 1936.

Devon Syndicate, Limited,

Principal,

By Geo. D. Welles,

Attorney in Fact and of Record.

Fidelity & Deposit Company of Maryland,

Surety.

By U. A. Luelleman.

(Seal)

State of Ohio, County of Lucas, ss:

Geo. D. Welles, being first duly sworn says that he has been duly and expressly authorized in writing by Devon Syndicate, Limited, the defendant in whose name, as principal, he has executed the foregoing bond on removal, to execute said bond in its name and on its behalf.

Geo. D. Welles.

Sworn to before me and subscribed in my presence this 2nd day of Sept., 1936.

Margaret Mobley,

(Seal)

Notary Public, Lucas County, Ohio.

My Commission Expires Nov. 30, 1936.

Sept. 2, 1936,

Bond approved,

James S. Martin, Judge.

On the 2nd day of September, 1936 being the 127th day of April Term 1936 an Order of Removal in said cause was made an entry of which appears on the Journal of said court in the words and figures as follows, to-wit:

No. 147,299

Horton C. Rorick,

vs.

Devon Syndicate, Limited.

#### ORDER OF REMOVAL

This day this cause came on to be heard on the petition and motion of the defendant herein, appearing specially for said purpose only, and for no other purpose, for the removal of this said cause from this court to the District Court of the United States for the Northern District of Ohio, Western Division, and the court, upon consideration of the same, and being fully advised in the premises, finds that said defendant has filed said petition for removal within the time provided by law and has at the same time offered its bond in the sum of Five Hundred Dollars (\$500.00) with good and sufficient surety, conditioned according to law, and the court further finds that notice required by law of the filing of said bond and petition prior to the filing thereof had been served upon the plaintiff herein, which notice the court finds was sufficient and in accordance with the requirements of the law.

It is therefore ordered that this court does now hereby approve and accept said bond and said petition and does hereby order this cause to be removed to the District Court of the United States for the Northern District of Ohio, Western Division, pursuant to the Statutes of the

United States, that the Clerk of this court shall prepare and deliver to plaintiff a certified copy of the record of said suit, and that all other proceedings in this court be stayed, to which order the plaintiff herein excepts.

James S. Martin, Judge.

### COSTS

Clerk's Costs .....	\$18.80
Sheriff's Costs .....	8.92
Printer .....	24.55
Notary Fee .....	4.00
Legal News .....	.35
<b>Total .....</b>	<b>\$56.62</b>

### CERTIFICATE TO COMMON PLEAS RECORD

The State of Ohio, Lucas County, ss:

I, Wm. F. Renz, Clerk of the Court of Common Pleas within and for said County, and in whose custody the Files, Pleadings, Journals, Execution Dockets, and Seal of said Court, are required by the Laws of the State of Ohio to be kept, hereby certify that the foregoing copy is taken and copied from the Records of the proceedings of the Court of Common Pleas within and for said County, and that said foregoing copy has been compared by me with the original Record, and that the same is a correct transcript therefrom.

In testimony whereof, I do hereunto subscribe my name officially, and affix the Seal of said court, at the Court House in Toledo, in said County, this 11th day of September, A. D. 1936.

Wm. F. Renz,  
Clerk.

(Seal)

United States of America, Northern District of Ohio, ss:

I, C. B. Watkins, Clerk of the United States District Court in and for the Northern District of Ohio, do hereby certify that the annexed and foregoing is a true and full copy of the original certified copy of the transcript of the Court of Common Pleas of Lucas County, Ohio, in a certain cause entitled, "Horton C. Rorick vs. Devon Syndicate, Limited," No. 147,299 in said Court of Common Pleas, as filed on the 1st day of October, 1936, in the District Court of the United States for the Northern District of Ohio, Western Division, as Cause No. 4172 at Law, and that the same is correctly copied from the original, now remaining among the records of said court in my office.

I do hereby further certify that said Cause No. 4172 at Law is now pending, undisposed of, on the docket of said court.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid court at Toledo, Ohio, this ... day of November, A. D. 1938, in the 163rd year of the independence of the United States of America.

C. B. Watkins,

Clerk.

By J. A. Green,

Deputy Clerk.

**CLERK'S CERTIFICATE**

United States Circuit Court of Appeals  
for the Sixth Circuit:

I, J. W. Menzies, clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of motion to dismiss, notice and certified copies in support in the case of Horton C. Rorick vs. Devon Syndicate, Ltd., a Canadian Corp., No. 7609, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said court at the City of Cincinnati, Ohio, this 12th day of April, A. D. 1939.

J. W. Menzies,

Clerk of the United States Circuit Court of  
Appeals for the Sixth Circuit.

(Seal)





**FILE COPY**

Office - Supreme Court, U. S.

**FILED**

**JUN 3 1939**

**CHARLES ELMORE CROPLEY**  
CLERK

**IN THE**  
**Supreme Court of the United States**

**October Term, 1938**

**No. 676**

**HORTON C. RORICK,**

*Petitioner,*

**vs.**

**DEVON SYNDICATE, LIMITED, A CANADIAN COR-  
PORATION,**

*Respondent.*

**PETITION FOR REHEARING OR FOR AMENDMENT  
OF OPINION**

**GEORGE D. WELLES,**

**807 Ohio Building, Toledo, Ohio.**

*Counsel for Respondent.*

**MILLER, OWEN, OTIS & BAILLY,**

**15 Broad Street, New York, New York,**

**WELLES, KELSEY, COBURN & HARRINGTON,**

**807 Ohio Building, Toledo, Ohio,**

**HENRY J. O'NEILL,**

**15 Broad Street, New York, New York,**

**FRED E. FULLER,**

**807 Ohio Building, Toledo, Ohio,**

**FRED A. SMITH,**

**807 Ohio Building, Toledo, Ohio,**

*Of Counsel.*



**IN THE**  
**Supreme Court of the United States**

October Term, 1938

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No. 676

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HORTON C. RORICK,

*Petitioner,*

vs.

DEVON SYNDICATE, LIMITED, A CANADIAN COR-  
PORATION,

*Respondent.*

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**PETITION FOR REHEARING OR FOR AMENDMENT  
OF OPINION**

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A sharp difference of opinion exists between counsel for the petitioner and counsel for the respondent as to the intent and meaning of the court's opinion in this matter, as is demonstrated by letters exchanged between counsel for the parties; copies of which are hereto attached, marked Exhibits A and B.

As counsel for respondent understand the court's opinion, it decides five things; viz.:

1. That the notary before whom the state court attachment affidavit was verified was not disqualified,

2. That the state court attachment was not prematurely issued,

3. That if the state court attachment proceedings were not invalid on other grounds (viz.: grounds other than those set forth at numbers 1 and 2 above), and if the state statutes permit an *alias* attachment, there is nothing in the Federal statutes or decisions preventing the issuance of a writ of attachment out of the Federal Court to reach additional property,

4. That if the state court attachment proceedings were invalid on any grounds, such proceedings would not support the later Federal attachment as an "auxiliary remedy" either as to the same or additional property and the Federal Court attachment would be invalid, and

5. That all of the objections raised by respondent to the state court attachment (other than numbers 1 and 2 above) and all other questions in the case (other than numbers 3 and 4 above) are left open for future determination by the courts below.

As will be noted by the letter from Fraser, Effler, Shumaker & Winn, counsel for the petitioner, copy of which is hereto attached, they are in accord with us that numbers 1 and 2 above were decided as above stated, but they disagree as to numbers 3, 4 and 5, and understand that the opinion holds:

A: "That in an action commenced in the state court and removed to the District Court, an attachment can be secured of the defendant's property subsequent to removal without personal service of summons if this could have been done had the case remained in the state court."

(By which we understand they think the opinion holds that it is not necessary that the state court should have acquired jurisdiction either *in personam* or *in rem* in order to permit a Federal Court attachment without personal service if the state statutes authorize an *alias* attachment.)

B. " \* \* \* that the liens of those (state court) attachments and garnishments 'having been obtained in the state court prior to removal, are preserved intact after removal'," and that the part of the court's opinion just quoted, "eliminates any further consideration of the contentions made in your (respondent's) motions filed in the District Court relating to the affidavits filed in the state court which were not expressly passed upon by the District Court and the Circuit Court of Appeals." (Words in parenthesis supplied by us.)

C. " \* \* \* the District Court now has before it for consideration the following questions only, to-wit: (1) Was the garnishment effected under the supplemental affidavit filed in the District Court after removal, valid under Ohio law; and (2) Have the garnishees or any of them any property in their possession belonging to the defendant."

D. " \* \* \* In view of the fact \* \* \* that the court held that the plaintiff had secured a lien by reason of the attachment in the state court prior to removal so that the subsequent attachment would merely constitute an extension of that lien, the court was not forced to expressly pass upon the question as to whether or not the affidavit filed in the District Court constituted an amendment of the affidavit originally filed in the state court."

We agree with counsel for petitioner that the questions mentioned in C above are open, but we disagree with their statement that they are the only questions left open and disagree with their views stated in A, B and D.

It thus appears that counsel for petitioner hold the view that this court has gone squarely counter to its statement to counsel on oral argument and has ruled against all of respondent's contentions attacking the validity of the state court attachment proceedings, including those upon which both lower courts found it unnecessary to pass and upon which this court declined to hear argument on the ground that in the event of a reversal such contentions would be left open for decision by the lower courts and which contentions the opinion does not discuss or specifically decide.

Counsel for respondent, on the other hand, believe that the opinion exactly conforms to what the court stated would be done in the event of reversal and that with the exception of points 1 to 4 above mentioned expressly or by necessary implication decided by the court's opinion, all questions were left open for decision by the lower courts, including the alleged grounds of invalidity of the state attachment proceeding not specifically discussed in and decided by the opinion.

The statements which counsel for petitioner regard as holding that "the plaintiff had secured a lien by reason of the attachment in the state court" we believe are merely statements of what the law is in cases in which attachment proceedings in state court are valid and that they are to be applied by the courts below to *this case only if the courts below find that the attachment proceed-*



*ings in the state court in this case are not subject to defects not passed upon by this court.*

This petition for rehearing is filed primarily for the purpose of seeking an expression from the court which will eliminate once and for all the possibility of any claim being made that the opinion does pass on the additional grounds of alleged invalidity of the state court attachment proceedings and other questions not specifically dealt with in the opinion.

We are not filing this petition for the purpose of requesting the court to consider further the four points which are specifically dealt with by the court in its opinion, as we understand it. If, however, we are mistaken in our interpretation of the court's opinion, and if, contrary to our belief, the court did intend to determine in this proceeding the validity of the state court attachment, then we respectfully submit that in accordance with precedent, as established by decisions in this court, respondent should have been permitted to support the decision below by urging,

“ \* \* \* any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. \* \* \* ”

*U. S. vs. American Ry. Exp. Co.*, 265 U. S.  
425, 435.

See also:

*Morley Co. vs. Maryland Casualty Co.*; 300  
U.S. 185, Syl. 3;

*Helvering vs. Gowran*, 302 U. S. 238, 245;

*Helvering, etc., vs. Pfeiffer*, 302 U. S. 247-  
251.

Applying the above rule to this case would mean that seven grounds of attack upon the state court attachment (in addition to those considered by the courts below and by this court) as well as respondent's claim of abandonment, might have been argued to and decided by this court. If the respondent is to be foreclosed by the opinion of this court from having such additional grounds of attack upon the state court judgment, and its claim of abandonment, considered by the courts below, then it follows, we respectfully submit, that it should be given an opportunity to present to this court these additional grounds for supporting the judgment below, and in such event, we submit, a rehearing and opportunity for further oral argument should be granted.

As hereinbefore stated, however, we are convinced that the scope of the court's opinion is limited, as we have hereinbefore undertaken to state, and that the court has not decided any point upon which it declined to hear argument. If we are correct in this belief, then we ask nothing of the court by this petition except such action as to the court shall seem proper to eliminate any possible misconstruction of its opinion, but we do most earnestly ask for that. If the court should consider it proper to define in its opinion or in its mandate what questions the lower courts are at liberty to consider, this would, it seems to us, be all that is necessary to that end.

Respectfully submitted,

GEORGE D. WELLES,  
*Counsel for Respondent.*

I hereby certify that the foregoing petition for rehearing or for amendment of opinion is presented in good faith and not for delay.

GEORGE D. WELLES,  
*Counsel for Respondent.*

MILLER, OWEN, OTIS & BAILLY,  
WELLES, KELSEY, COBOURN & HARRINGTON,  
HENRY J. O'NEILL,  
FRED E. FULLER,  
FRED A. SMITH,  
*Of Counsel.*



**EXHIBIT A**

Law Offices of  
**WEILES, KELSEY, COBOURN & HARRINGTON**  
Ohio Building  
Toledo, Ohio

May 26, 1939.

Attention: Messrs. Effler and Swartzbaugh  
Fraser, Effler, Shumaker & Winn  
700 Home Bank Building  
Toledo, Ohio

Re: Horton C. Rorick, Petitioner, vs.  
Devon Syndicate, Limited, Respondent

Gentlemen:

In a conversation yesterday between Mr. Swartzbaugh, of counsel for the petitioner, and Mr. Fuller, of counsel for the respondent, Mr. Swartzbaugh stated, in substance, that it was his understanding of the opinion of the Supreme Court of the United States in the above entitled action that it was thereby finally adjudged that a valid lien was acquired by Mr. Rorick by the proceedings in the state court; that the only question left open by the opinion of the Supreme Court is the question as to whether the lien so acquired was extended to other property by the later attachment proceedings in Federal Court and that all of our contentions with respect to defects in the state court proceedings, whether specifically dealt with or not in the Supreme Court's opinion, are in fact decided adversely to our contentions by that opinion, including those which the Supreme Court, upon the oral argument, stated would not be passed upon by it.

It seems to Mr. Fuller and myself on the other hand

that the opinion very clearly shows that the court passed upon only three questions, namely:

1. That the state court affidavit was verified before a qualified notary,

2. That the state court affidavit was not prematurely issued, and

3. That if the state court proceedings were not invalid on other grounds, and if a further attachment would have been permissible under state law in the state court, then, in such events, after removal to Federal Court a further attachment reaching additional property is not prohibited by Federal statutes or decisions.

It is further our understanding of the opinion that it expressly left open all questions other than the three above enumerated, including all questions (other than numbers one and two above), bearing upon whether or not a valid attachment lien was in fact created by the proceedings in state court prior to removal and that, by necessary inference from what is said in the opinion, it follows that if no jurisdiction in rem was acquired by the state court, that is, if the attachment proceedings in that court were not valid, then the subsequent attachment proceedings in Federal Court were also void.

If your understanding of the opinion of the Supreme Court is as stated by Mr. Swartzbaugh to Mr. Fuller, or if it otherwise differs from our understanding, as above stated, we assume that you will agree that it is desirable that the matter be presented to the Supreme Court so that any possible question of the scope of the decision may now be removed.

We contemplate promptly bringing this difference of opinion as to the proper interpretation of the Supreme

Court's opinion to the attention of that court by application for rehearing, or in some other proper way, and in that connection expect to present to the Supreme Court a copy of this letter to you, together with a copy of any reply you may deem proper to make to it. We would appreciate your advising us whether your understanding of the opinion is correctly set forth in the first paragraph of this letter and if it is not we would welcome a statement correctly setting forth what is your understanding of it.

Will you please let us have your reply at your earliest convenience and oblige.

Yours very truly,

Geo. D. Welles,  
Counsel for respondent,  
Devon Syndicate, Limited.

gdw fbc





**EXHIBIT B****FRASER, EFFLER, SHUMAKER & WINN****Attorneys****Seventh Floor Home Bank Building****Toledo, Ohio****June 1, 1939.****Re: Horton C. Rorick, Petitioner vs.****Devon Syndicate, Limited, Respondent.****Welles, Kelsey, Cobourn & Harrington,****807 Ohio Building,****Toledo, Ohio.****Gentlemen:**

In reply to your letter dated May 26, 1939, we believe it desirable to clearly state our understanding of the decision of the Supreme Court of the United States in the above entitled matter without further reference to what Mr. Swartzbaugh may or may not have said to Mr. Fuller on the occasion referred to in your letter.

In its opinion the Supreme Court expressly stated that of the various questions raised in the courts below, "those urged in the petition for certiorari and incidental to their determination" were considered on the review. With these self-imposed limitations, the Supreme Court, in our opinion, expressly held:

1. That the attachments and garnishments secured under the affidavits filed in the state court were not premature and void because issued before the first publication of notice.
2. That in an action commenced in the state court and removed to the District Court, an attachment can be secured of the defendant's property subsequent to re-

removal without personal service of summons if this could have been done had the case remained in the state court.

Incidental to the foregoing, the Supreme Court expressly held that the notary public on the affidavits filed in the state court was not disqualified. Having concluded that the said notary was competent and that the attachments and garnishments secured in the state court were not premature or void because obtained prior to personal service or before commencement of service by publication, the court held that the liens of those attachments and garnishments "having been obtained in the state court prior to removal, are preserved intact after removal."

It is our opinion that the part of the court's opinion quoted immediately above eliminates any further consideration of the contentions made in your motions filed in the District Court relating to the affidavits filed in the state court which were not expressly passed upon by the District Court and the Circuit Court of Appeals.

If we are correct in our understanding of the Supreme Court's opinion, the District Court now has before it for consideration the following questions only: to-wit: (1) Was the garnishment effected under the supplemental affidavit filed in the District Court after removal, valid under Ohio law; and (2) Have the garnishees or any of them any property in their possession belonging to the defendant.

We believe that our opinion as to the holding of the Supreme Court is fortified by reason of the fact that in our briefs and in oral argument we urged that irrespective of whether or not the affidavits filed in the state court prior to removal were defective for any reason

whatsoever (which they were not), they were amended by the supplemental affidavit in attachment and garnishment filed in the District Court by leave of court, following removal. The effect of such amendment was to cure, ab initio, any infirmities which may have existed in the state court proceedings.

This contention was based upon the express provisions of 28 U. S. C. Sec. 767 (R. S. Sec. 948); 28 U. S. C. Sec. 777 (R. S. Sec. 954), and upon the authority of *Stephenson vs. Kirtley*, 269 U. S. 163; *Erstein vs. Rothschild* (C. C. Mich.), 22 Fed. 61; *Booth vs. Denike* (C. C. Tex.), 65 Fed. 43; *Nevada Co. vs. Farnsworth* (D. C. Utah), 89 Fed. 164; *Bowden vs. Burnham* (C. C. A. 8), 59 Fed. 752; *Salmon vs. Mills, et al.* (C. C. A. 8), 68 Fed. 180.

The foregoing cases all clearly hold that in the federal court proceedings in attachment and garnishment may be amended and that the amendment relates back to the time of the filing of the original affidavit. This would likewise have been true under the liberal Ohio law relating to amendments in attachment and similar proceedings. Ohio General Code Sections 10214, 11363, 11364; *Hart vs. Andrews*, 103 O. S. 218; *Austin vs. Morris*, 103 O. S. 449.

Certainly the removal of the case to the Federal Court did not deprive us of the right of amendment given to us by the Ohio statutes and decisions of the Ohio Supreme Court thereunder. But if the question of amendment became, after removal, a question purely of federal law, that question was necessarily before the United States Supreme Court. In view of the fact, however, that the court held that the plaintiff had secured a lien by reason of the attachment in the state court prior to removal so

that the subsequent attachment would merely constitute an extension of that lien, the court was not forced to expressly pass upon the question as to whether or not the affidavit filed in the District Court constituted an amendment of the affidavit originally filed in the state court.

We do not intend to limit ourselves by the statements made in this letter, but the foregoing represents in a general way our present interpretation of the Supreme Court's decision in this case.

Yours very truly,  
Fraser, Effler, Shumaker & Winn.

R. B. S.

L. S. T.







## SUPREME COURT OF THE UNITED STATES.

No. 676.—OCTOBER TERM, 1938.

Horton C. Rorick, Petitioner,	} Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
vs.	
De on Syndicate, Limited, Respondent.	

[May 22, 1939.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

The case is here on a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. We granted the writ because the court below had decided an important question of local law in a way probably in conflict with applicable local decisions and probably had misconstrued certain federal statutes and a decision of this Court thereunder.

The basic question here involved is whether a federal district court, in the absence of jurisdiction *in personam* and after removal of a cause from a state court where jurisdiction *in rem* over certain property of a defendant has already been acquired, can issue an order of attachment or garnishment against other property of the same defendant.

Petitioner, a resident of Ohio, brought suit on June 19, 1930, in a state court in Ohio against respondent, a nonresident corporation organized under Canadian law, on a contract claim for personal services rendered.<sup>1</sup> Summons was concurrently issued, but personal service was never had; and simultaneously, an affidavit in attachment and garnishment was filed. A second affidavit in attachment and garnishment was filed on June 27, 1930, naming additional persons; and shortly thereafter certain funds and property of respondent were garnished. Subsequently, service by publication was completed; and soon afterwards, and before judgment, respondent appeared specially and obtained a removal of the cause to the District Court of the United States for the Northern District of

<sup>1</sup> Paris E. Singer was also named a defendant in the original petition but died pending the action. Since subsequent proceedings were continued against respondent alone, the cause is treated as if Devon Syndicate, Limited, were the sole defendant.

Ohio, Western Division. In the District Court respondent also appeared specially and moved to quash the service by publication and to dismiss the attachment and garnishment. Nothing further was done in the cause for over five years. Then, on February 17, 1936, petitioner, with leave of the District Court, filed a supplemental and amended petition repeating in substance the allegations of the original petition; and a supplemental affidavit in garnishment which named as garnishees the same persons designated in the original affidavits of June 1930 in the state court. On the same day, the District Court issued an order of attachment and notices to garnishees. Under the latter additional funds in the hands of one of the garnishees were reached. And on April 11, 1936, respondents again appeared specially in the District Court, and moved, *inter alia*, to dismiss the attachment and garnishment under the supplemental affidavit of February 17, 1936. After removal to the District Court there was neither personal service, nor, so far as appears, service by publication.

By its motions of January 26, 1931, and April 11, 1936, respondent asserted that the affidavits in attachment and garnishment were defective and void under Ohio law; that there was no property of respondent within the jurisdiction of the District Court or the state court on which any valid attachment could be or was levied; that there was no property of respondent in the possession of any of the garnishees; that the attachment and garnishment and the service of summons were void by reason of incorrect designation of respondent; that there was no lawful service of summons under the supplemental and amended petition made on respondent; that the supplemental attachment and garnishment under the amended petition were also void for lack of personal service; and that the District Court had no jurisdiction over either the respondent or its property appropriate for the maintenance of this action.

After oral argument on respondent's motions, the District Court entered an order discharging the attachment and garnishment and striking the petition from the files of the court, on the grounds that the affidavits in attachment and garnishment, dated June 19 and June 27, 1930, were defective and void, and that the supplemental affidavit in attachment and garnishment was also void and ineffective, since no personal service had been made on respondent. On appeal to the Circuit Court of Appeals the judgment was affirmed on the grounds that the original attachment or garnishment in the state court was premature and void; that on removal the fed-

eral District Court could not validate an attachment not perfected in the state court proceeding; and that attachment may not issue in a federal District Court until the defendant has been personally served or has voluntarily appeared.

Of the various questions raised below and briefed here, only those urged in the petition for certiorari and incidental to their determination will be considered on review. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175; *Connecticut Railway & Lighting Co. v. Palmer*, 305 U. S. —.

Before coming to the basic question here involved, namely, whether the garnishment secured in the District Court under the supplemental affidavit of February 17, 1936, was void, there are two preliminary questions. These are (1) whether the notary public before whom the affidavits in attachment and garnishment of June 19 and June 27, 1930, were taken was disqualified, thus rendering the garnishment proceedings void and of no effect; and (2) whether the garnishments obtained in the state court were premature and void because they were secured without personal service and prior to the first publication of notice of constructive service.

*First.* The Ohio General Code provided that an affidavit might be used to obtain a provisional remedy such as attachment or garnishment (Sec. 11523), and that an affidavit might be made before any person authorized to take depositions (Sec. 11524). Sec. 11532 provided that "The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding." The notary in question was D. W. Drennan, a member of the Ohio bar and of the bar of the District Court. Although Drennan had some private practice of his own, he was in the employ of a corporation, of which petitioner was president, and previously in the employ of a predecessor partnership, of which petitioner was a member. But he did not represent petitioner in this case; nor had he ever represented him as personal counsel; nor was he consulted by petitioner with reference to this case; nor was he related to petitioner; nor did he have any financial stake in the outcome of this suit. His sole connection with the case was that he acted as notary on a few papers. Furthermore, the petition in this case alleged a cause of action personal to petitioner, not one on behalf of the corporation by which Drennan was employed or on behalf of its predecessor partnership.

Since Drennan was not a "relative or attorney" of petitioner, he was not disqualified to take the affidavit unless within the meaning of the Ohio statute he was "otherwise interested in the event of the action or proceeding." The District Court held that he was so interested. We do not so interpret the Ohio law. Absent some legal or material interest, it seems to us, on the basis of the Ohio authorities which we have found, that there must be some immediate interest in the action akin to that of a relative in order for the notary to run afoul of the statutory prohibition. Disability thus depends on the particular circumstances of each case—the degree of intimacy in relationship between petitioner and notary. In *Rhineland Co. v. Pittsburgh Co.*, 15-Oh. C. C. (N. S.) 286, an Ohio court held that a young man working as a salaried employee for a firm of attorneys retained in the case was not disqualified by the foregoing section from taking an affidavit in the case as notary. The interest which disqualifies under the Ohio statute, said that Court, is "some legal, certain and immediate interest such as formerly disqualified a witness from testifying." *Id.*, p. 286. Certainly, if an employee of one who himself is disqualified to act as notary is qualified so to act, an employee of a corporation whose officer is suing not on behalf of the corporation but for himself would seem to be similarly qualified under Ohio law. This seems to us especially persuasive, since the notary in question was in fact taking not a deposition but an affidavit and since the affidavit was not for use as evidence.<sup>2</sup> Accordingly, we conclude that the affi-

<sup>2</sup> There is Ohio authority for the view that Sec. 11532 of the Ohio General Code under which the notary's disqualification is asserted was intended only to define and regulate the taking of affidavits to be used as testimony in a judicial proceeding. *City Commission of City of Gallipolis v. State*, 36 Oh. App. 258. On the other hand, *Leavitt v. Rosenberg*, 83 Oh. St. 230, squarely held that an attachment was defective because the affidavit was made before a notary who was the attorney for the plaintiff in violation of Sec. 11532—then Sec. 5271 Rev. Stat. And though that case, so far as appears, has never been overruled, its holding and Sec. 11532 were nevertheless before the court in *Evans v. Lawyer*, 123 Oh. St. 62. There the Court referred to certain sections of the General Code (including Sec. 11532) which relate to execution of affidavits and said "The sections of the Code referred to relate to the mode of taking testimony, and are found under Part Third, Title IV, Division III, relating to procedure in common pleas court, in Chapter 3 in regard to evidence. We think these sections of the Code relate to affidavits to be used in the sense of evidence." *Id.*, p. 66. Though we are not justified on these authorities in concluding that the prohibitions contained in Sec. 11532 are inapplicable to notaries before whom affidavits in attachment and garnishment are taken, nevertheless they lend support to the view that in considering whether or not a notary is "otherwise interested" in the event of the action within the meaning of the section, it is appropriate to give some weight to the function which the affidavit in question is to perform, in the absence of a contrary ruling by the Ohio courts.

davits of June 19 and June 27, 1930, were not defective because they were sworn to before D. W. Drennan.<sup>3</sup>

*Second.* Sec. 11279 of the Ohio General Code provides that "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon." Sec. 11819 provides that "In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant" upon various enumerated grounds. In this case the petition was filed, summons was issued, and an affidavit in attachment and garnishment was filed—all on June 19, 1930. It would seem, therefore, that Sec. 11819 was satisfied. But the Circuit Court of Appeals held that an attachment which issued before personal service was obtained, or before the beginning of publication for substituted service, was premature and void. Under that test the attachments and garnishments sought in the state court on June 19 and June 27, 1930, were defective since personal service was never had and since service by publication was not commenced until several months later.

The Circuit Court of Appeals reached this conclusion in reliance upon its earlier decision in *Doherty v. Cremery*, 83 F. (2d) 388, and upon the decision of the Supreme Court of Ohio in *Seibert v. Switzer*, 35 Oh. St. 661.

We think the Circuit Court of Appeals erred. The chronology of events in the *Doherty* case is the same as the chronology here—attachment was issued on the day the petition was filed and substantially in advance of commencement of service by publication. Personal service was not had. The court relied upon Sec. 11230 of the Ohio General Code and upon *Seibert v. Switzer*, *supra*. Sec. 11230 is contained in Chapter 2 of Division 1 of Title IV of the Ohio

<sup>3</sup> Another reason urged by respondent for the invalidity of the affidavits in question is that the notary was disqualified by Sec. 121 of the Ohio General Code which provides: "No banker, broker, cashier, director, teller, or clerk of a bank, banker or broker, or other person holding an official relation to a bank, banker, or broker, shall be competent to act as notary public in any matter in which such bank, banker, or broker is interested." Respondent claims that the corporation of which petitioner was an officer and by which the notary was employed, as well as the predecessor partnership, was a municipal bond broker; that petitioner, being an officer of the corporation, was himself a broker; and that therefore the notary was a "clerk of" or "other person holding an official relation to" a "broker". Suffice it to note (1) that the notary was not in the employ of petitioner; and (2) that neither the corporation nor its predecessor partnership appears to be "interested" in the action. As alleged, the action seems to be personal to petitioner.



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General Code. Title IV is entitled "Procedure in Common Pleas Court". Chapter 2 of Division 1 is entitled "Limitation of Actions". Sec. 11230 provides: "An action shall be deemed to be commenced *within the meaning of this chapter*, as to each defendant, at the date of the summons which is served on him or on a co-defendant who is a joint contractor, or otherwise united in interest with him. When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication, if it be regularly made" (Italics added).

It seems clear to us that the words "An action shall be deemed to be commenced within the meaning of this chapter" confine the operation of the section to matters concerning the limitation of actions, the subject to which the chapter is expressly devoted. The Supreme Court Commission of Ohio in *Bacher v. Shawhan*, 41 Oh. St. 271, so interpreted Sec. 4988 Rev. Stats. (now Sec. 11231 of the Ohio General Code) which provided: "An attempt to commence an action shall be deemed to be equivalent to the commencement thereof within the meaning of this chapter, when the party diligently endeavors to procure service; but such attempt must be followed by service within sixty days." The court held that the trial court did not lose jurisdiction because service by publication was not commenced, personal service not being had, until some seven months after suit was brought and an order of attachment was issued and levied. The court said: "It will be observed that the restrictive words 'within the meaning of this chapter,' confine the operation of the section to matters concerning the limitations of actions." It seems to us that the legislative intent was to prevent parties from indefinitely prolonging a suspension of the statute by a mere attempt to sue." *Id.*, p. 272.

On that authority we conclude that "at or after its commencement" as used in Sec. 11819 means the commencement described in Sec. 11279, not the commencement described in Sec. 11230. Additional support for this conclusion is found in *Seibert v. Switzer*, 35 Oh. St. 661, on which the Circuit Court of Appeals relied for the contrary conclusion. There the validity of an order of attachment which had been issued and served prior to the filing of the petition was in issue. At that time Sec. 11279 (then Civil Code, § 55) was identically the same as at present. Sec. 11819 (then Civil Code, § 191) was, so far as material here, substantially the same as it is now; i. e., it allowed the plaintiff in a civil action for the recovery of money to have an attachment "at or after the commencement" of the action. Sec. 11820 (then Civil Code, § 192) at that time, as



now, provided that the order of attachment should be made "by the clerk of the court in which the action is brought". And Sec. 11821 (then Civil Code, § 193) required in case of attachment, as it does now, a bond by the "plaintiff" to the "defendant" except in case defendant was a non-resident or a foreign corporation. The court in *Seibert v. Switzer, supra*, held that the order of attachment was unauthorized and void,\* and said: "No action was, in fact, commenced by the filing of a petition, until some three or four hours after the order of attachment was served and returned.

"The statute does not authorize an attachment except in an action, and the clerk of the court has no authority to issue the order of attachment until an action is brought, and the relation of plaintiff and defendant is established in the case.

"An action is commenced or brought, within the meaning of sections 192 and 193, by the filing of a petition and causing a summons to issue thereon. Code, § 55 . . . " *Id.*, p. 665.

The *Seibert* case and the *Bacher* case thus seem to be wholly consistent. An order of attachment issued prior to the filing of a petition and issuance of summons is void; an order of attachment issued after filing of the petition and the issuance of summons but prior to the commencement of service by publication is valid, though personal service is not had.

In view of these Ohio authorities, we conclude that the attachments or garnishments secured in the state court were not premature or void because obtained prior to personal service or before commencement of service by publication. See also, *St. John v. Parsons*, 54 Ohio App. 420. Those liens, having been obtained in the state court prior to removal, are preserved intact after removal. Sec. 646 of the Revised Statutes (28 U. S. C. § 629).<sup>5</sup>

<sup>4</sup> It should also be noted that Sec. 11230 (Civil Code, § 20) was substantially the same then as now. Though that section provided that "within the meaning of this section" an action where service by publication was proper should "be deemed commenced at the date of the first publication," the court determined the date of commencement by Sec. 11279 without mentioning Sec. 11230.

<sup>5</sup> Sec. 646 provides: "When any suit shall be removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed."

*Third.* This brings us to the main issue in the case—whether a federal District Court has the power to issue an order of attachment or garnishment in a removed cause if jurisdiction *in rem* has been obtained prior to removal. The Circuit Court of Appeals relied upon the rule laid down in *Big Vein Coal Company of West Virginia v. Read*, 229 U. S. 31, that an attachment may not issue in a federal District Court where no personal service has been had upon defendant or where defendant has made no personal appearance. One of the earliest antecedents of the *Big Vein Coal Company* case, *supra*, was *Toland v. Sprague*, 12 Pet. 300. In that case a citizen of Pennsylvania brought suit in the Circuit Court of the United States for the District of Pennsylvania against a citizen of Massachusetts who was domiciled abroad. No personal service was had, but an attachment was levied upon defendant's property in Pennsylvania. Sec. 739 of the Revised Statutes then provided that no civil suit should be brought in either the circuit or district court against any inhabitant of the United States by any original process in any other district than that whereof he was an inhabitant or in which he was found at the time of the serving of the writ. This Court by a divided vote concluded that an attachment could not be issued except as a part of, or together with, process served upon defendant personally. And in *Ex parte Railway Company*, 103 U. S. 794, this Court concluded that since the defendant was an inhabitant of a state outside the jurisdiction of the federal court and was not found or served with process in that jurisdiction, no attachment could issue from that court against his property. It was on the basis of those two precedents that this Court later made its decision in *Big Vein Coal Company of West Virginia v. Read*, *supra*. In that case, plaintiff instituted suit in the federal court. A summons was issued and returned not found. Thereafter an order of attachment was issued. It was held that unless jurisdiction *in personam* is obtained over the defendant, his estate may not be attached in the federal court, an attachment being but "an incident to a suit" and not a means of acquiring jurisdiction. *Id.*, p. 38. This conclusion was reached in spite of the fact that Sec. 739 had been changed since *Ex Parte Railway Company*, *supra*, by addition of a diversity of citizenship clause permitting suit "in the district of the residence of either the defendant or plaintiff", and in spite of Sec. 915 of the Revised Statutes (28 U. S. C. § 726), discussed hereafter. Never-

theless, this Court held that since Congress had not explicitly provided for service by publication in such cases, attachment could be obtained only in cases where service was adequate for a judgment *in personam*.

The argument for extension or application of the rule followed from *Toland v. Sprague* to *Big Vein Coal Company of West Virginia v. Reed*, *supra*, to cases such as the instant one loses its persuasiveness. Ingrained in those decisions is the feeling that it would be unjust for a person to have his rights passed upon in the absence of the notice afforded by personal service, so that he might appear and defend himself. That philosophy was perhaps best expressed by Mr. Justice Miller sitting in circuit in *Nazoro v. Cragin*, 3 Dill. 474, 476, where he said, in 1873, that a contrary doctrine would "compel citizens of the Pacific Coast to go to New York to defend their property which happened to be there and would give the great central cities vast power". But that viewpoint had not been expressed by the Congress in Sec. 646. That section gave validity in the federal court to attachments obtained in the state court prior to removal, by its provision that any attachment in the state court suit "shall hold the goods or estate so attached" to answer the final judgment or decree. And this Court has solicitously protected attachments obtained prior to removal, even though jurisdiction *in rem* had not been perfected in the state court by service by publication. *Clark v. Wells*, 203 U. S. 164. So to a considerable degree, this Court in pursuance of the policy of the Congress as expressed in Sec. 646, has not adhered rigorously to the philosophy underlying the antecedents of the *Big Vein Coal Company* case. For most assuredly a defendant whose property is attached in a state court prior to removal may not have been given notice of the kind which personal service would provide, since the state procedure as in this case commonly permits attachment or garnishment where only service by publication can be made.

But we need not rely merely on inferences drawn from statutory construction, since the Congress has provided plaintiffs in federal courts with procedural remedies available in state courts. Sec. 915 of the Revised Statutes provides:

"In common-law causes in the district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which were, on June 1, 1872, provided by the laws of the State in which such court is held for the courts thereof; and such district courts may, from time to time, by

general rules, adopt such State laws as may be in force in the State where they are held in relation to attachments and other process. Similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy."

This section when read with Sec. 646, indicates to us that where jurisdiction *in rem* has been acquired prior to removal, plaintiff may obtain in the federal court after removal such orders of attachment or garnishment as would have been available to him had he been permitted to remain in the state court. Such interpretation merely makes it possible for a lien obtained in a state court prior to removal to be extended by the federal court to other property of the same defendant. It introduces no new element in the statutory scheme for, as we have said, the lien which Sec. 646 protects may often have been obtained without personal service. The policy which recognizes the validity of a lien preserved by virtue of Sec. 646, though personal service is lacking, permits extension of that lien by a federal District Court under like circumstances to other property of the same defendant by reason of Sec. 915.

This holding can be brought within the rule of the *Big Vein Coal Company* case, *supra*, if that decision is narrowly limited. For in one sense it can be said that attachment or garnishment is here used only as an "auxiliary remedy". *Id.*, p 37. The garnishment effected under the affidavit of February 17, 1936, if valid under Ohio law, would merely extend the proceedings *in rem* to reach other property of the same defendant. Accordingly, if that extension is permissible under Sec. 915, it is not defective merely because jurisdiction *in personam* is absent. Whether or not such extension is permissible is a matter of state law on which we do not pass. Since the case will be remanded, that question and other questions raised by the respondent can be more appropriately disposed of by the District Court.

The judgment of the Circuit Court of Appeals is reversed, and the case is remanded to the District Court for further proceedings in conformity with this opinion.

*Judgment reversed.*

